This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

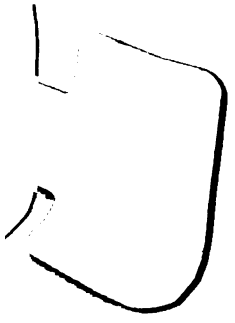
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



D
EN
KR
V.

THE

MINING REPORTS.

CONTAINING THE CASES ON THE

LAW OF MINES

FOUND IN THE AMERICAN, ENGLISH AND CANADIAN REPORTS.
CHRONOLOGICALLY ARRANGED

WITH NOTES AND REFERENCES.

By R. S. MORRISON and EMILIO D. DESOTO,
OF THE COLORADO BAR.

VOL. XVIII.

CHICAGO:
CALLAGHAN & COMPANY.
1903.

COPYRIGHT,
1908,
BY CALLAGHAN & COMPANY

CASES REPORTED IN VOLUME XVIII.

Alhambra Co., Scheel v. 616.
Allyn, Schultz v. 649.
Altoona Co. v. Integral Co. 410.
Amy & Silversmith Co., King v. 76.
Anvil Co. v. Humble, 98.
Argonaut Cons. M. Co. v. Turner, 556.
Armstrong v. Lake Champlain Co. 279.

Bailey v. Bond, 466.
Balfour v. Russell, 202.
Bartlett, Koen v. 289.
Bartley v. Phillips, 145; 542.
Bettman v. Harness, 500.
Bennett v. Harkrader, 224.
Black v. Elkhorn Co. 375.
Blackburn, U. S. v. 684.
Blake v. Lobb's Estate, 462.
Blakley v. Marshall, 350.
Bond, Bailey v. 466.
Bush, Gowen v. 433.
Buxton Co., Golden Reward Co. v. 592.

California Co., Gird v. 45.
Calkins, Cardoza v. 689.
Campbell v. Ellet, 669.
Canon City Co., United Coal Co. v. 639.
Cardoza v. Calkins, 689.
Carroll, Harkrader v. 474.
Carson, Girard v. 346.
Carter v. Thompson, 134.
Casey v. Thieviege, 624.
Cash G. M. Co., St. Clair v. 523.
Catron v. Old, 569.
Champion Co., Cons. Wyoming Co. v. 113.
Cons. Wyoming Co. v. Champion Co. 113.
Craw v. Wilson, 244.
Crocker v. Manley, 485.

Del Monte Co. v. New York Co. 188.
Dodge, Perego v. 364.
Doe v. Waterloo Co. 265.
Double v. Union Co. 327.

Edelman v. Latshaw, 608.
Edmonds v. Mounsey, 384.
Elkhorn Co., Black v. 375.
Ellet, Campbell v. 669.
Enterprise Co. v. National Co. 312.
——— v. Rico Aspen Co. 661.
Erskine v. Forest Oil Co. 297.

Forest Oil Co., Erskine v. 297.
Forst, Hooks v. 139.
Franklin Co. v. O'Brien, 331.
Frick Co., Lewey v. 179.

Gillett, Quigley v. 68.
Gillis, Stinchfield v. 195.
Girard v. Carson, 346.
Gird v. California Co. 45.
Golden Reward Co. v. Buxton Co. 592.
Gormley, Wettengel v. 93.
Gowen v. Bush, 433.
Guffy, Williams v. 478.

Hallack v. Traber, 360.
Hamerstag, Moore v. 256.
Harkrader, Bennett v. 224.
———— v. Carroll, 474.
Harness, Bettman v. 500.
H. C. Frick Co., Lewey v. 179.
Henszey v. Langdon-Henszey Co. 614.
Hooks v. Forst, 139.
Humble, Anvil M. Co. v. 98.

Indianapolis Gas Co. v. Teters, 391.
Integral Co., Altoona Co. v. 410.

Justice Co. v. Lee, 220.

Kelly v. Marshall, 317.
————, Virginia Coal Co. v. 395.
King v. Amy & Silversmith Co. 76.
Kleppner v. Lemon, 404.
Koen v. Bartlett, 289.
Kunkle v. Peoples Gas Co. 153.

Lake Champlain Co., Armstrong v. 279.
Langdon-Henszey Co., Henszey v. 614.
Last Chance Co. v. Tyler Co. 205.
————, Tyler Co. v. 303.
Latshaw, Edelman v. 608.
Lee, Justice Co. v. 220.
Lemon, Kleppner v. 404.
Lewey v. H. C. Frick Co. 179.
Lobb's Estate, Blake v. 462.
Lynch v. Versailles Co. 149.

Manley, Crocker v. 485.
Manuel v. Wulff, 85.
Marks, Steiner v. 320.
Marshall, Blakley v. 350.
————, Kelly v. 317.
———— v. Mellon, 548.
Mather v. Rillston, 165.
Mathews v. Peoples Gas Co. 552.
Mellon, Marshall v. 548.
Meydenbauer v. Stevens, 578.
Migeon v. Montana Co. 446.
Miller, Royston v. 418.
Mitchell, Woodward v. 158.
Montana Co., Migeon v. 446.
Moore v. Hamerstag, 256.
Mounsey, Edmonds v. 384.
Mudsill Co. v. Watrous, 1.

National Co., Enterprise Co. v. 312.
Nesbitt, Vietti v. 247.
New York Co., Del Monte Co. v. 188.
Norton, Wakeman v. 698.

O'Brien, Franklin Co. v. 331.
Old, Catron v. 569.

Parenteau, Taylor v. 534.
Patterson, Windfall Co. v. 674.
Peard, Trevaskis v. 353.
Peoples Gas Co., Kunkle v. 153.
————, Mathews v. 552.
Perego v. Dodge, 364.
Phillips, Bartley v. 145; 542.

Quigley v. Gillett, 68.

Republican M. Co. v. Tyler Co 564.
Rico Aspen Co., Enterprise Co. v. 661.
Rillston, Mather v. 165.
Royston v. Miller, 418.
Russell, Balfour v. 202.

St. Clair v. Cash G. M. Co. 523.
Scheel v. Alhambra Co. 616.
Schultz v. Allyn, 649.
Shellar v. Shivers, 260.
Shivers, Shellar v. 260.
Stahl v. Van Vleck, 231.
Steiner v. Marks, 320.
Stevens, Meydenbauer v. 578.
Stinchfield v. Gillis, 195.

Taylor v. Parenteau, 534.
Teters, Indianapolis Gas Co. v. 391.
Thieviege, Casey v. 624.
Thompson, Carter v. 134.
Traber, Hallack v. 360.
Trevaskis v. Peard, 353.
Turner, Argonaut Cons. Co. v. 556.
Tyler Co., Last Chance Co. v. 205.
——— v. Last Chance Co. 303.
———, Republican M. Co. v. 564.

Union Co., Double v. 327.
United Coal Co. v. Canon City Co. 639.
U. S. v. Blackburn, 684.

Van Vleck, Stahl v. 231.
Versailles Co., Lynch v. 149.
Vietti v. Nesbitt, 247.
Virginia Coal Co. v. Kelly, 395.

Wakeman v. Norton, 698.
Waterloo Co., Doe v. 265.
Watrous, Mudsill Co. v. 1.
Wettengel v. Gormley, 93.
Williams v. Guffy, 478.
Wilson, Craw v. 244.
Windfall Co. v. Patterson, 674.
Woodward v. Mitchell, 158.
Wulff v. Manuel v. 85.

TABLE OF CASES CITED IN VOL. XVIII.

THOSE CASES PRINTED IN ITALICS ARE TO BE FOUND REPORTED IN THE SERIES.

Adams v. Reed, 466.
Aderhold v. Supply Co. 388.
Ajax Co. v. Hilkey, 77.
Alaska Co. v. Whelan, 434.
Algier v. Steamer Maria, 537.
Algonquin Co. v. Northern Co. 395.
Allen v. Car Co. 301.
——— v. Dunlap, 500.
Altoona Co. v. Integral Co. 418.
American Co. v. Virginia Co. 202.
Ammidown v. Ball, 623.
Amy-Silversmith Case, 192, 575.
Anaconda Co. v. Butte Co. 248.
Anderson v. Harvey's Heirs, 503, 505, 506.
Andrews v. Tamarack Co. 166.
Anthony v. Jillson, 411, 415, 657.
Argentine Co. v. Terrible Co. 209, 303, 573.
Argonaut Co. v. Turner, 577.
Armstrong v. Auen, 396.
——— *v. Caldwell*, 400, 401.
——— *v. Lower*, 131, 346, 348, 560, 705.
Asbestos Co. v. Durand, 171.
Ashenfelter v. Williams, 248.
Association v. Hetzel, 545.
——— v. Shryock, 442.
Attorney General v. Welsh Co. 285, 288.
Attwood v. Small, 498.
Axiom Co. v. Little, 364.
——— v. White, 68.
Aye v. Philadelphia Co. 145, 353.

Babcock v. Scoville, 387.
Back v. Sierra Nevada Co. 667.
Backhouse v. Bonomi, 186.
Bacon v. Thornton, 581.
Bagnell v. Broderick, 477.
Baker v. Hart, 639.
Balfour v. Russell, 260.
Baltimore Co. v. Brydon, 98.
Bank v. Bissell, 472.
——— v. Greenhood, 451.
——— v. G. V. B. M. Co. 248.
——— v. Miller, 620.
——— v. Peters, 425.
Barden v. Railroad Co. 136, 137.
Barker v. Dale, 580.
Barksdale v. Parker's Admr. 400.
Barnard v. Sherley, 679.
Bartley v. Phillips, 353.
Bates v. Swiger, 520.
Batterson v. Magone, 279.
Baxter v. Roberts, 437.
Belk v. Meagher, 73, 91, 380, 415, 454.
Bell v. Bean, 171.
——— *v. Bed Rock Co.* 357, 476.

——— *v. Wilson*, 284, 287.
Belleville Co. v. Mooney, 433, 434.
Benavides v. Hunt, 158.
Bennett v. Harkrader, 411.
Benson Co. v. Alta Co. 382, 531.
Berg v. Persons, 169.
Bibend v. Insurance Co. 254.
Bicknell v. Mining Co. 472.
Billings v. Aspen Co. 220, 223.
Bishop v. Baisley, 353, 581.
Blair v. Bartlett, 215.
——— v. Peck, 408.
Blake v. Assurance Soc. 28.
——— *v. Lobb's Estate*, 478.
——— v. Thorn, 658.
Blakley v. Marshall, 289, 548, 549.
Bloomfield Co. v. Tidrick, 462.
Bluebird Co. v. Largey, 76.
Bluestone Co. v. Bell, 462.
Boggs v. Merced Co. 134.
Bohall v. Dilla, 137.
Bollo v. Navarro, 430.
Bond v. Dustin, 371.
Bonetti v. Treat, 386.
Book v. Justice M. Co. 120, 195, 270, 360, 364, 457, 578.
Booth v. Small, 470.
Borell v. Borell, 315.
Boskowitz v. Davis, 339.
Bottomley v. U. S. 28.
Bowling v. Burton, 623.
Bowman v. Bates, 608.
Boyd v. Woolwine, 510.
Bracken v. Cooper, 339.
Brady v. Husby, 579.
Bramlett v. Flick, 265, 580.
Brazil Co. v. Gaffney, 169.
——— v. Young, 169.
Brewster v. Shoemaker, 669.
Brooks v. Kunkle, 543.
Brown v. Homan, 339.
——— v. Iron Co. 369.
——— v. Mayor, 215.
——— v. U. S. 278.
Brown County v. Martin, 243.
Brownfield v. Bier, 458, 630, 631, 632, 636.
Buchanan v. King's Heirs, 399.
Buck v. Lodge, 472.
Buckley v. Fox, 85.
Bunker Hill Co. v. Empire Co. 303, 592.
——— *v. Pascoe*, 649.
Burke v. McDonald, 113, 224, 534.
Burton v. Barclay, 387.
——— v. Mills, 213.
Bushnell v. Proprietors, 616.
Butler v. Watkins, 28.
Butte Co. v. Frank, 256.
——— v. Sloan, 446.

Caldwell v. Copeland, 400, 401.
——— *v. Fulton*, 400.
Caley v. Coggswell, 248.
Calhoun v. Neely, 145.
Calhoun Co. v. Ajax Co. 195, 556, 661.
Campbell v. Iron Silver Co. 581.
——— *v. Rankin*, 210.
——— v. Silver Bow Co. 579, 616.
Canter v. Insurance Co. 567.
Caperton's Admr. v. Caperton's Heirs, 513, 517.
Carleton Co. v. Ryan, 433.
Carlin v. Hammel, 387.
Carnahan v. Connolly, 68.
Carnegie Co. v. Phila. Co. 93.
Carney v. Hadley, 503.
Carroll v. Brown, 403.
Carson City Co. v. North Star Co. 113, 188, 474, 602.
Carter v. Bacigalupi, 270, 474.
Casey v. Thieviege, 446, 684.
Castle v. Bullard, 28.
Catlin Co. v. Lloyd, 395.
Cave v. Crafts, 623.

Cedar Co. v. Yarwood, 331.
Cerrillos Co. v. Deserant, 166.
Chambers v. Harrington, 61, 62, 75, 421, 539.
Champion Co. v. Cons. Wyoming Co. 113, 116.
Chandler v. Pittsburgh Co. 552.
Chatham F. Co. v. Moffatt, 2.
Cheesman v. Shreeve, 703.
Childers v. Neely, 247.
Christian v. Vance, 504.
Christy v. Scott, 590.
Cincinnati Co. v. Western Co. 107.
Clark v. Buffalo Hump Co. 608.
Clark v. Everhart, 613.
——— v. Fitzgerald, 188.
Cleary v. Skiffich, 684.
Cleghorn v. Bird, 687.
Cleveland v. Citizens Co. 679.
Clipper Co. v. Eli Co. 446.
Coal Co. v. Snowden, 300.
Cobb v. Hatfield, 38.
Coburn v. Cedar Val. Co. 369.
Cochran v. Pew, 93, 147, 389, 544.
Cochrane v. Justice Co. 466.
Coffee v. Emigh, 195.
Cole v. Gray, 162.
Colorado F. & I. Co. v. Pryor, 385.
Commercial Bank v. Nolan, 241.
Com. v. Julius, 545.
Cons. Coal Co. v. Peers, 384.
——— v. Scheiber, 167.
——— v. Seniger, 170.
——— v. Wombacher, 166, 433.
Cons. Wyo. Co. v. Champion Co. 76, 188, 307, 568, 575, 576, 578, 703.
Contreras v. Merck, 158, 353.
Cook v. Harris, 387.
Coolidge v. Hager, 623.
Cooper v. Lovering, 608.
Cooter v. Barton, 163.
Cornelius v. Molloy, 608.
Corning v. Iron Co. 567.
Cosmopolitan Co. v. Foote, 76, 77.
Cosmos Co. v. Gray Eagle Co. 500.
Costa v. Pacific Co. 434.
County of Cochise v. Copper Q. Co. 2.
Cowan v. Radford Co. 93.
Cox v. Douglass, 503.
Craig v. Leslie, 223.
Cresap v. Kemble, 503, 506.
Crescent Co. v. Silver King Co. 297.
Creveling v. Iron Co. 389.
Cribb v. Rogers, 293.
Crislip v. Cain, 513.
Crocker v. Manley, 2.
Croesus Co. v. Colo. Land Co. 538, 581.
Cromwell v. Co. of Sac, 210.
Crosier v. McLaughlin, 431.
Crouch v. Puryear, 293, 295.
Cunningham v. Harper, 231, 239.
Curtis v. Lakin, 3.
——— v. Suteer, 163.

Dahl v. Raunheim, 601.
Dalton v. Cleveland R. Co. 677.
Damainville v. Mann, 387.
Danielson v. Gude, 646.
Darvill v. Roper, 283.
Davis v. Brown, 210.
——— *v. Butler*, 476.
——— *v. Henry*, 2.
——— v. Trade Dollar Co. 434.
——— v. Weibbold, 136, 137, 459.
Davis Wagon Wheel Co. v. Davis Iron Co. 344.
Deeney v. Mineral Co. 68.
Deep M. Co. v. Fitzgerald, 168.
Deffeback v. Hawke, 459.

Deidesheimer, In re, 614.
Del Monte Co. v. Last Chance Co. 76, 188, 303.
——— *v. New York Co.* 76, 307, 568, 576, 698.
Denniston v. Haddock, 350.
Derry v. Ross, 364, 474, 476.
Deserant v. Cerillos Co. 171.
Detlor v. Holland, 279.
De Uprey v. De Uprey, 430.
Development Co. v. Silva, 8.
Diamond Co. v. Curless, 543.
Dibble v. Castle Co. 68.
Dickey's Appeal, 343.
Dikeman v. Sunday Co. 327.
Dobler v. Northern Pac. Ry., 684.
Doe v. Brady, 293.
——— *v. Waterloo Co.* 47, 68, 76, 85, 131, 256, 602, 703.
Doellner v. Tynan, 679.
Doherty v. Morris, 418, 539.
Donnelly v. Booth Co. 433.
Donovan v. Cons. Coal Co. 639.
Double v. Union Co. 139, 260.
Dower v. Richards, 477, 459, 637.
Doxey's Estate v. Service, 327.
Drake v. Root, 536.
Dreyfus v. Badger, 684.
Ducie v. Ford, 256.
Duff v. Wilson, 343.
Duffield v. Hue, 149, 320.
——— v. Michaels, 320.
Duggan v. Davey, 131, 703.
Duncan v. Fulton, 224.
——— v. Hayes, 678.
Dunham v. Loverock, 248.
Durant v. Corbin, 45.
Durgan v. Redding, 364.
Dwinel v. Stone, 252.
Dyke v. Caldwell, 689.

Earl of Jersey v. Guardians, 285.
Earl of Rosse v. Wainman, 284, 288.
East Jellico Co. v. Stewart, 433.
Eaton v. Allegany Co. 260.
——— v. Jaques, 387.
Eberle v. Carmichael, 46.
Eddy v. Aurora Co. 167.
Edgar v. Donnally, 246.
Edmonds v. Mounsey, 139, 543.
Edwards v. Iola Co. 149.
Eley's Appeal, 295.
Ellet v. Campbell, 667.
Emerson v. Santa Clara Co. 414.
Empire Co. v. Bunker Hill Co. 303.
Enterprise Co. v. Rico-Aspen Co. 671.
Erhardt v. Boaro, 269, 506, 665.
Etling v. Potter, 684.
Eureka Co. v. Richmond Co. 583, 636.

Farmer v. Water Co. 623.
Farnsworth v. Duffner, 496, 498.
Faulkner v. Mammoth Co. 433.
Feeney v. Howard, 258.
Fennell v. Guffey, 388.
Field v. Grey, 579.
Findlay v. Smith, 293.
Finnegan v. Campbell, 215.
Fisher v. Guffey, 384.
——— v. Seymour, 265, 360.
Fishmongers Co. v. Robertson, 241.
Fissure Co. v. Old Susan Co. 46, 661.
Fitzgerald v. Clarke, 76, 307.
Flagg v. Mann, 343.
Flagstaff Co. v. Tarbet, 76, 192, 209, 572.
Flaherty v. Gwinn, 271.
Fleming v. Daly, 113.
Foote v. National Co. 113.
Forbes v. Gracey, 91, 380.
Forrer v. Forrer's Exr's. 399.
420 Co. v. Bullion Co. 413, 415, 592, 601.
Fox v. Hale Co. 523.

Fox v. Mackay, 98.
Franklin Co. v. O'Brien, 360.
French v. Mfg. Co. 476.
Frentz v. Klotsch, 339.
Friend v. Oggshaw, 581.
Friess v. Rider, 473.
Fritzler v. Robinson, 462.
Funk v. Haldeman, 548.

Gage v. Phillips, 429.
Gaines v. Virginia Co. 478.
Galey v. Kellerman, 389.
Gardom v. Woodward, 546.
Garthe v. Hart, 258.
Gas Co. v. DeWitt, 300, 323, 549.
——— v. George, 262, 517.
Gelcich v. Moriarty, 270.
Genett v. Delaware Co. 616.
Geneva Co. v. Coursey, 279.
Genter v. Conglomerate Co. 312.
Georgia Co. v. Davitte, 297.
Gerkins v. Kentucky Co. 289, 548.
Gibson v. Oliver, 93.
Gilbert v. Hunnewell, 38.
——— v. Showerman, 679.
Gill v. Weston, 548.
Gillis v. McKinney, 315.
Girard v. Carson, 581.
Gird v. California Co. 158, 410, 418.
Giordano v. Brandywine Co. 170.
Glacier Mt. Co. v. Willis, 410.
Glasgow v. Chartiers Co. 158.
Glass Factory v. Reid, 255.
Gleeson v. Mining Co. 52, 270.
Gloninger v. Hagard, 300.
Gohres v. Illinois Co. 535.
Golden Fleece Co. v. Cable Co. 269.
Golden Terra Co. v. Mahler, 346.
Goller v. Fett, 258.
Gordon v. Butler, 8.
——— v. George, 386.
Gore v. McBrayer, 259.
Gorman Co. v. Alexander, 85.
Governeur v. Robertson, 88, 92, 223.
Graham v. Thompson, 520.
Gray v. Quicksilver Co. 608.
Grayson v. Lynch, 451.
Green v. Glynn, 163.
——— v. Western Co. 169.
Gregory v. Bank, 425.
——— *v. Pershbaker*, 273.
Gribben v. Atkinson, 462, 464.
Gurney v. Ford, 623.
Gwillim v. Donnellan, 91, 346, 348, 659.

Hahn v. U. S. 278.
Hale v. Penn's Heirs, 403.
Hall v. Duke of Norfolk, 179.
——— *v. Kearny*, 46, 539.
——— v. Vandergrift, 181.
Hallack v. Traber, 331.
Hamilton v. Hamilton, 182.
——— v. Mendota Co. 167.
——— *v. Mining Co.* 601.
Hammer v. Garfield Co. 73, 227.
Hansen v. Fletcher, 535.
Harder Co. v. Schmidt, 433.
Harkrader v. Carroll, 353, 446.
Harris v. Balfour Co. 168.
——— *v. Equator Co.* 256, 415.
——— v. Kellogg, 68, 580.
——— *v. Ohio Co.* 93.
Hartman v. Warren, 134.
Hartney v. Gosling, 247.
Hartwell v. Camman, 286.
Harvey v. Ryan, 271.
Hasshagen v. Hasshagen, 258.
Hatch v. Thompson, 293.
Hawk v. Brownell, 494.
Hawkins v. Spokane Co. 312, 523.
Haws v. Victoria Co. 578, 590, 689, 698.
Hay v. Storrs, 231, 239, 240.
Hayes' Appeal, 430.

Hays v. Carr, 163.
Heaney v. Butte Co. 297.
Hector Co. v. Valley Co. 158, 353.
Hedlun v. Holy Terror Co. 433.
Hemmer v. Cooper, 494.
Henry v. Mayer, 2.
——— v. Stevens, 164.
Herriman Co. v. Butterfield Co. 523.
Hewitt Co. v. Dessau Co. 462.
Hext v. Gill, 279, 284, 285, 287.
Heyward v. Farmers Co. 297, 500.
Higgins v. California Co. 385.
Highland Boy Co. v. Strickley, 579.
Hill v. Winston, 167.
Himrod Co. v. Clark, 168.
Hipp v. Babin, 301, 302.
Hirbour v. Reeding, 244.
Hoch v. Bass, 297.
Hodges v. Spicer, 293.
Hodgson v. Fowler, 248.
Hoffman v. Beecher, 68.
Holbrook v. Connor, 494.
Holdsworth v. Ticker, 472.
Holland v. Mining Co. 270.
Holloway v. Southmayd, 623.
Holmes v. State, 451.
Homestake Co. v. Fullerton, 433.
Hook v. Garfield Co. 289.
Hooks v. Forst, 384.
Hope M. Co. v. Brown, 666.
Hopkins v. Lee, 210.
Horton v. New Pass Co. 248.
Hosford v. Metcalf, 158.
Houck v. Graham, 164.
Hovenden v. Lord Annesley, 185.
Howard v. City of Huron, 601.
——— v. Dayton Co. 639.
——— v. Mfg. Co. 106.
Howeth v. Sullenger, 535.
Hoxie v. Insurance Co. 27.
Huckenstine's Appeal, 679.
Hudepohl v. Water Co. 250.
Huggins v. Daley, 317.
Hughes v. Oregon Co. 168.
——— v. Streeter, 239.
Hukill v. Myers, 149, 522.
Hunt v. Eureka Gulch Co. 410.
——— v. Patchin, 422.
Hurd v. Tomkins, 248.
Hurst v. Hurst, 293.
Hutchinson v. Kline, 395.
Hyman v. Wheeler, 113.

Iba v. Central Ass'n. 580.
Idaho Co. v. Union Co. 317.
Improvement Co. v. Bradbury, 368, 371.
Indianapolis Co. v. Kibbey, 145, 500, 580.
——— *v. Teters*, 478.
Indian R. Steamboat Co. v. East Coast Co. 503.
Ingram v. Golden Co. 149.
Insurance Co. v. Armstrong, 28.
——— v. Patterson, 621.
——— v. Wilkinson, 515.
Integral Co. v. Altoona Co. 158, 580.
Iron Co. v. Pierce, 425.
——— *v. Reymert*, 506.
——— *v. Wright*, 465.
Iron S. Co. v. Campbell, 230, 703.
——— *v. Cheesman*, 113, 583.
——— *v. Elgin Co.* 83, 193, 568, 572, 574, 576, 703.
——— *v. Mike & Starr Co.* 456, 458, 460, 630, 631, 636.

Jackel v. Caldwell, 319.
Jackson v. Beach, 92.
——— *v. O'Hara*, 145, 384, 543.
——— v. Trullinger, 623.
——— v. Van Hoesen, 296.
Jacobson v. Bunker Hill Co. 153.
James v. Oil Co. 408.
Jamestown Co. v. Egbert, 327.
Jarrett v. Johnson, 430.

Jennings v. Broughton, 8.
Jerome v. Ross, 502, 503, 504, 505, 506.
Jewitt v. Dringer, 531.
Johnson v. Hosford, 164.
Johnson Co. v. Wharton, 210.
Johnston v. Standard Co. 38.
Jones v. Anderson, 272.
——— v. Gas Co. 554.
——— v. Pacific Co. 364.
——— *v. Prospect Co.* 669.
——— v. Rees Exr's, 181.
——— v. Snider, 230.
——— v. Stanton, 339.
——— v. Western Pa. Gas Co. 543.
Jordan v. Osgood, 28.
Jupiter Co. v. Bodie Co. 50, 541.

Kannaugh v. Mining Co. 601.
Kansas City Co. v. Clay, 684.
Kearney v. Case, 371, 372.
Keech v. Sandford, 339.
Keiser v. Lovett, 678.
Keller v. Auble, 339.
Kelley v. Kelley, 389.
Kennedy v. Crawford, 478.
Kifer v. Smyers, 248.
Kilbourn v. Sunderland, 369.
King v. Amy Co. 124, 192, 209, 303, 562, 573, 574, 577.
——— v. Rowan, 339.
Kinney v. Mining Co. 429.
Kleppner v. Lemon, 93, 404.
Kline v. Jacobs, 315.
Klopenstine v. Hays, 46.
Knox v. Pioneer Co. 434.
Koen v. Bartlett, 350.
Krogstad, Matter of, 92.

Laflin v. Herrington, 239.
Lamb v. Schottler, 425.
Lampman v. Milks, 623.
Last Chance Co. v. Ames, 168.
——— *v. Tyler Co.* 124, 188, 373, 562, 567, 568, 573, 574, 575.
Lavagnino v. Uhlig, 592.
Lawrence v. Dale, 38.
Leadville Co. v. Fitzgerald, 131, 702.
Leatherman v. Oliver, 145, 554.
Ledoux v. Forester, 535.
Lee v. Bumgardner, 400.
——— v. Fox, 343.
Lee Doon v. Tesh, 657.
Legrand v. Rixey's Admr's, 213.
Lehigh Co. v. Warrek, 167, 434.
Lendberg v. Brotherton Co. 434.
Lenfers v. Henke, 375.
Lewis v. Town of N. Kingston, 505, 508.
Lillibridge v. Lackawanna Co. 396, 400.
Linden v. Anchor Co. 167.
Linton Co. v. Persons, 434.
Little Josephine Co. v. Fullerton, 113, 537.
Little Pittsburg Co. v. Little Chief Co. 527, 531.
Lockhart v. Leeds, 265.
——— *v. Rollins*, 410, 423.
——— *v. Wills*, 353.
Lohmann v. Helmer, 85.
Lone Jack Co. v. Megginson, 85.
Long's Appeal, 300.
Lord v. Carbon Co. 639.
——— v. Perrin, 92.
Louisville Ry. v. Thompson, 164.
Lowry v. Silver City Co. 649.
Lowther Co. v. Guffey, 327.
Lucas v. King, 430.
Luck v. Luck, 316.
Ludington v. Renick, 498.
Lulay v. Barnes, 395.
Lumber Co. v. Buchtel, 210, 212.
Lynch v. Burford, 202.
——— *v. Gas Co.* 323.
Lysle v. Williams, 329.

Macaulay's Ex'r. v. Land Co. 293.
Malad Val. Co. v. Campbell, 689.

Malcolm v. Fuller, 169.
Mallett v. Uncle Sam Co. 476.
Mammoth M. Co. v. St. Lake Co., 451.
Man v. Huk, 92.
Mangum v. Bullion Beck Co. 166.
Manning v. Strehlow, 224, 536.
Manuel v. Wulff, 276, 380.
Manufacturing Co. v. Moses, 531.
Marshall v. Harney Peak Co. 145, 353.
——— v. Manufacturing Co. 269.
——— *v. Mellon*, 289.
Marshall Co. v. Kirtley, 410.
Martin v. Hunter's Lessee, 567.
Martinez v. Earnshaw, 98.
Marys v. Anderson, 329.
Mason v. Bridge Co. 520, 521.
——— v. Sieglitz, 248.
Mathews v. Peoples Co. 145.
Matthews v. Bliss, 339.
May v. Hazelwood Co. 158.
Mayhew v. Burke, 248.
Meagher v. Reed, 247, 256.
Medbury v. Watson, 494.
Melton v. Lambard, 258.
Messimer's Appeal, 300.
Meylette v. Brennan, 244.
Mickle v. Douglas, 260.
Migeon v. Montana Ry. 474, 624, 629.
Miller v. Bullion-Beck Co. 170.
——— v. Insurance Co. 515.
Mills v. Fletcher, 353.
——— v. Norfolk Co. 98.
Mining Co. v. Casteel, 386.
——— *v. Leach*, 123.
——— *v. Reynolds*, 456, 457, 458, 630.
——— v. Sweeney, 564, 565, 567.
——— *v. Taylor*, 270
Minter v. Crommelin, 477.
Mitchell v. Cline, 45, 432.
Moffat v. U. S. 477.
Montague v. Salb, 339.
Montana Co. v. Boston Co. 556, 698.
——— *v. Clark*, 76, 575.
——— *v. St. Louis Co.* 698.
Moore v. Brown, 285, 581.
——— v. McNutt, 504.
Morbach v. Home M. Co. 434.
Morenhout v. Higuera, 430.
Moritz v. Lavelle, 259, 657.
Morrison v. Snow, 2.
Morton v. Mining Co. 258.
Moss v. Rose, 158.
Moulor v. Insurance Co. 515.
Mount Diablo Co. v. Callison, 61, 421.
Mt. Rosa Co. v. Palmer, 446.
Mudsill Co. v. Watrous, 485.
Muhlenberg v. Henning, 465.
Mulhern v. Lehigh Co. 169.
Mullan v. U. S. 134.
Muller v. Dows, 277.
Munroe v. Armstrong, 148.
Murley v. Ennis, 244.
Murray v. Polglase, 364.
Murray Hill Co. v. Havenor, 331, 580, 649.
Myers v. Reed, 339.
——— *v. Spooner*, 359.

McCarthy v. Speed, 85, 446, 649.
McCharles v. Horn S. M. Co. 170.
McClellan v. Pyeatt, 444.
McCutchen v. Blanton, 678.
McDonald v. Montana Co. 46.
McDowell v. Hendrix, 386, 552.
McGinnis v. Egbert, 224, 536.
McGoon v. Ankeny, 476.
McGowan v. Bailey, 312.
McGregor v. Camden, 674.
McIntosh v. Price. 535.
McKay v. McDougall, 353.

McKinley v. Wheeler, 277.
McKinley Co. v. Alaska Co. 85.
McKinney v. Reader, 142.
McKnight v. Gas Co. 405, 406.
McMillan v. Ferrell, 503.
——— v. Philadelphia Co. 389.
McMillan Co. v. Black, 168.

Nash v. Towne, 513.
Nashville Ry. v. U. S. 215.
National Co. v. Minnesota Co. 179.
Neely v. Bair, 148.
Neely's Appeal, 182.
Neill v. Lacy, 401.
——— v. Shamburg, 248.
Neilson v. Nebo Co. 166.
Nemetty v. Naylor, 215.
Nesbit v. Godfrey, 328.
——— v. Indpt. Dist. 210.
Newark Coal Co. v. Upson, 232.
Newbill v. Thurston, 265, 268.
New Ipswich Factory v. Batchelder, 623.
Niles v. Kennan, 474.
Noetling v. Wright, 494.
Noonan v. Pardee, 179.
Norris v. Crocker, 424.
——— v. Gould, 316.
North Am. Co. v. Adams, 353, 516.
Northern Pac. Co. v. Richmond, 169.
Noyes v. Mantle, 91, 454, 459.

Oakes v. Turquand, 38.
Ober v. Schenck, 320.
O'Connor v. Irvine, 360.
O'Donnell v. Glenn, 113.
Ogden v. Hatry, 555.
Oil Co. v. Blake, 389.
——— v. *Marbury*, 38.
Omaha Co. v. Tabor, 646.
Omar v. Soper, 265.
Oolagah Co. v. McCaleb, 500.
O'Reilly v. Campbell, 220.
Orr v. Mercer County Ins. Co. 215.
Osborn v. Bank, 505.
Osterman v. Baldwin, 92.
Otey v. Stuart, 402.
Owen v. Phillips, 679.

Packett Co. v. Sickles, 210.
Palmer v. Truby, 93.
Parker v. Furlong, 297.
——— v. Wallis, 580.
Parrish v. Ferris, 210.
Patterson v. Hitchcock, 131.
——— v. Tarbell, 265.
Peabody Co. v. Gold Hill Co. 134.
Peerless Co. v. Wray, 166.
Pence v. Langdon, 38, 42.
Pennington v. Gibson, 210.
Pennsylvania Co. v. Bales, 410.
——— v. Nee, 167, 168.
Pensacola Ice Co. v. Perry, 230.
Peo. v. District Court, 581.
Perego v. Dodge, 380.
Perkins v. Peterson, 248.
Perry v. Richardson, 431.
Petroleum Co. v. Coal Co. 581.
Petty v. Fogle, 514.
Phelps v. Townsend, 241.
Phillips v. Vandergrift, 554.
Philpotts v. Blasdel, 274.
Phoenix Co. v. Com. 614.
Picot v. Page, 339.
Pierce v. Tennessee Co. 170.
Pillow v. Improvement Co. 399.
Pittsburgh Co. v. Lake Superior Co. 649.
Plant v. Stott, 646.
Plummer v. Hillsdale Co. 396.
Polk v. Wendell, 477.
Pollard v. Shively, 53, 538.
Portland Co. v. Flaherty, 171, 435.
Poujade v. Ryan, 578.
Powell v. Lantzy, 401.
Power v. Sla, 581.

Pratt v. Paulos, 98.
Presidio Co. v. Bullis, 320.
Providence Co. v. Burke, 68, 85.
——— v. Marks, 410.

Quackenbush v. Sawyer, 250.
Quigley v. Gillett, 412.

Rafferty v. State, 28.
Ragsdale v. Mitchell, 163.
Railroad Co. v. Austin, 425.
——— v. Boestler, 473.
——— v. Grant, 424.
Railway Co. v. Checkley, 285, 288.
——— v. Crawford, 425.
——— v. Dunmeyer, 135.
——— v. Farr, 444.
——— v. Jarvi, 440.
——— v. McLelland, 442.
——— v. Robinson, 283, 288.
——— v. Rust, 473.
Rankin's Appeal, 295.
Ray v. Gas Co. 389.
Raymond v. Johnson, 244, 265.
Read v. Huff, 430.
Reagan v. McKibben, 360.
Real Del Monte Co. v. Pond Co. 472.
Redfield v. Railroad Co. 470.
Reese v. Morgan Co. 166.
Reg v. Marquita M. Co. 614.
Republican Co. v. Tyler Co. 206.
Reynell v. Sprye, 44.
Reynes v. Dumont, 369.
Reynolds v. Cook, 580.
——— *v. Iron Silver Co.* 579.
Rhodes v. Dunbar, 679.
Rice v. Rigley, 244.
Richard v. Wolfling, 346.
Richardson v. McNulty, 474, 476.
Richmond Co. v. Rose, 216.
Rinda v. Northern Pac. Ry. 684.
Ripley v. Insurance Co. 473.
Rippetoe v. Dwyer, 339.
Roberts v. Central Lead Co. 171.
——— v. Cooper, 567.
——— v. Dunsmuir, 165.
——— v. Thorn, 339.
Romona Co. v. Phillips, 166.
Rose v. Himeley, 567.
——— v. Richmond Co. 535.
Rosenthal v. Ives, 657.
Roseville Co. v. Iowa Gulch Co. 256.
Ross v. Miner, 28.
——— v. Union Co. 434.
Rothwell v. Dewees, 337, 339.
Royston v. Miller, 46, 331, 410.
Rush v. French, 258.
Russell v. Dayton Co. 170.
——— v. Place, 210.
Ryan v. Copes, 679.

St. Louis Co. v. Kemp, 62, 457, 539, 561, 636.
——— *v. Montana Co.* 500, 569, 661.
St. Louis Pub. School v. Boatman Ins. Co. 387.
Sanders v. Partridge, 388.
Santa Maria, The, 567.
Saunders v. Mackey, 418.
Scandinavian Co. v. Whittaker, 170.
Schiffer v. Dietz, 38.
Schoonover v. Bright, 503.
Schulenberg v. Harriman, 91.
Schultz v. Allyn, 580.
Schwab v. Beam, 158, 689.
Scroggin v. Johnston, 451.
Scott v. Michael, 623.
Searle v. Whipperman, 164.
Sears v. Taylor, 579, 698.
Settle v. Winters, 317.
Seymour v. Wood, 359.
Shackleford v. Bailey, 239.
Shepley v. Cowan, 382.
Sherlock v. Leighton, 46, 85.
Sherman v. Sandell, 258.

Sherwood v. Sissa, 253.
Shipman v. Saltsburg Coal Co. 98.
Shoshone Co. v. Rutter, 578.
Sibbald v. U. S. 567.
Sigourney v. Munn, 246.
Silver City Co. v. Lowry, 331.
Simons v. Vulcan Co. 2.
Sizer v. Many, 567.
Smiley v. Dixon, 339.
Smith v. Brinker, 387.
——— v. Cooley, 623.
——— v. Gardner, 503, 504.
——— *v. Hawkins*, 689.
——— v. Hillside Co. 433.
——— v. Jameson, 297.
——— v. Kernochan, 210.
——— v. Smith, 613.
——— v. Thackerah, 186.
Snell v. Levitt, 381.
Snow v. Nelson, 256, 317.
Souter v. Maguire, 657.
South End Co. v. Tinney, 579.
Southern Co. v. Colquitt, 153.
——— v. Darnell, 649.
——— *v. Silva*, 493, 496.
So. Penn. Co. v. Edgell, 149, 320.
South West Co. v. Smith, 169.
Sparks v. Hess, 623.
Speed v. McCarthy, 331.
Springer v. Gas Co. 388.
Springside Co. v. Grogan, 167.
Spring Valley Co. v. Patting, 170.
Stage v. Boyer, 353.
Standley v. Roberts, 385.
State v. District Court, 77.
Stearns v. Harman, 403.
Steel v. Refining Co. 136, 222.
Stevens v. Peard, 357.
——— v. Reynolds, 339.
——— *v. Williams*, 133.
Stewart v. Railway Co. 386.
Stinchfield v. Gillis, 579, 649.
Stockton v. Ford, 210.
Stoll v. Daly Co. 170.
Stone v. Marshall Co. 384.
Stoughten's Appeal, 352, 548, 549.
Stout v. Lye, 210.
Strepey v. Stark, 346, 363, 579.
Stickley v. Hill, 85.
Strobel v. Kerr Salt Co. 674.
Stuart v. Adams, 248, 251.
——— v. Pennis, 399.
Stumph v. Reger, 163.
Sullivan v. Mining Co. 453, 458, 459, 460, 630.
Sullivan v. Sullivan, 470.
Sunnyside Co. v. Reitz, 523, 639.
Szotak v. Berwind-White Co. 165.

Tabor v. Sullivan, 646.
Tanner v. Smith, 38.
Taylor v. Middleton, 145.
Tecumseh Co. v. Camp, 312.
Tennessee Co. v. Currier, 167.
Thompson v. Christie, 152, 323.
——— v. Smith, 182.
——— v. Spray, 258, 265, 657.
Thompson's Appeal, 649.
Tibbitts v. Ah Tong, 91.
Titsworth v. Stout, 339.
Tornanses v. Melsing, 85.
Trayes v. Johns, 247.
Treat v. Hiles, 256, 462.
Trevaskis v. Peard, 474, 477.
Trickey v. Crowe, 317.
Tripp v. Dunphy, 410.
Trotter v. Heckscher, 98.
Tuck v. Downing, 485, 495, 496.
Tucker v. Linger, 283.
Tufts v. McClure, 472.
Tunnel Co. v. Stranahan, 270, 272.
Turner v. Sawyer, 331, 339.
Tyler Co. v. Last Chance Co. 76, 564.
——— v. Sweeney, 76, 124, 188, 206.

Ulrich v. Drischell, 163.
Uinta Co. v. Creede Co. 134, 661.

Union Co. v. Crawford, 171.
Union Oil Co. in re. 46.
U. S. v. Appleton, 621.
——— v. Auffmordt, 424.
——— v. Claflin, 424.
——— v. Flint, 688.
——— *v. Gear*, 504.
——— *v. Homestake Co.* 523.
——— v. Iron Silver Co. 134, 456, 458, 630.
——— v. Jones, 217, 373.
——— v. Moore, 278.
——— v. Reed, 687.
——— v. Throckmorton, 601.
——— v. Tichenor, 688.
——— v. White, 601, 688.
——— v. Winona Co. 134.
University v. Tucker, 294.
University of Vt. v. Joslyn, 387.
Upton v. Tribilcock, 38.
Uren v. Golden Co. 171, 434.
Utt v. Frey, 695.

Vance v. Burbank, 137, 601.
Vane v. Irwin, 434.
Van Horn v. Fonda, 339.
Van Meter v. Chicago Co. 158.
Van Valkenburg v. Huff, 258.
Venable v. Beauchamp, 339, 342.
Venture Co. v. Fretts, 142, 148, 474, 544.
Vincent v. Oil Co. 319.
Voorhees v. Burchard, 282, 621.

Wakeman v. Norton, 639.
Walker v. Bamberger, 256.
——— *v. Reeves*, 387.
Wallace v. Standard Co. 433.
Walling v. Miller, 505.
Walrath v. Champion M. Co. 76, 77, 129.
Walsh v. Ringer, 231, 239.
Walton v. Cronly's Admr's, 387.
Ward v. Warren, 623.
Waring v. Crow, 359.
Water Co. v. Richardson, 537.
Waters v. Stevenson, 531.
Watervale Co. v. Leach, 76, 303.
Watson v. Ferrell, 504, 508.
Waugh's Exr's v. Waugh, 293.
Weaver v. Cone, 546.
——— v. Iselin, 166.
Welch v. Garrett, 158.
Wenham v. Switzer, 360.
Western Pa. Gas. Co. v. George, 262.
Westmoreland Co.'s Appeal, 550.
Westmoreland Co. v. DeWitt, 500, 543.
Wheeler v. Mineral Farm Co. 2.
White v. Manhattan Ry. 381.
White Stone Co. v. Belknap Co. 260.
Whitehead v. Shattuck, 302.
Whiting v. Hill, 485.
Whitman v. Haltenhoff, 592.
Whittaker v. Lindley, 375.
Wight v. DuBois, 601.
Wilhelm v. Silvester, 123.
Willi v. Dryden, 387.
Williams v. Bosanquet, 387.
——— *v. Gibson*, 279, 400.
——— *v. Guffey*, 391, 462.
——— *v. Long*, 500.
——— v. Morrison, 523.
——— v. Pearson, 295.
——— *v. Pomeroy Co.* 179.
——— v. Vanderbilt, 389.
Williamson v. Jones, 153, 293, 500, 505.
——— v. Sheldon Co. 169.
Wills' Appeal, 389.
Wills v. Mfr's Gas Co. 147, 542, 544.
Willson v. Cleveland, 357.
Wilson v. Beach Creek Co. 462.
——— v. Triumph Co. 85, 220.
Winton Co. v. Pancoast Co. 312.
Witte v. Quinn, 623.
Wofford v. McKinna, 239.

Wolf v. Guffey, 390.
Wolverton v. Nichols, 47.
Woodburn's Estate, 552.
Woodenware Co. v. U. S. 531, 646.
Wright v. Ascheim, 232.
——— v. Roseberry, 253.

Yancey v. Hopkins, 403.
Yarwood v. Johnson, 418.
Yates v. Stuart's Adm'r, 503.
Young v. Forest Co. 473.
——— v. Goldsteen, 364.

Zimmler v. San Luis Co. 649.

TABLE OF HEADINGS.

Page

ABANDONMENT 158, 353, 474
ADVERSE CLAIM 68, 346, 364, 410
AGRICULTURAL LAND 684
ALIENS 85, 220
ANNUAL LABOR 418
APEX 76, 188, 205, 564, 569
APPROPRIATION 689
CONFUSION 523
CONTRACT 98
CONVEYANCE 195
DOWER 375
DUMP 616
EJECTMENT 578
END LINES 303
ESTOPPEL 649
EXHAUSTED MINE 462
FORFEITURE 145, 149, 260, 542
FRAUD 1, 608
INJUNCTION 231, 297
INSPECTION 614
KNOWN LODE 624
LEASE 139, 320, 327, 384, 552
LOCATION 265, 534
LOCATION CERTIFICATE 224
LODE 113
MARRIED WOMEN 153
MASTER AND SERVANT 165
MINERALS 279
NEGLIGENCE 433
OIL 93, 202, 317, 391, 404, 478, 500, 674
PARTNERSHIP 247
PATENT 556, 592
PLACERS 45, 446
PROSPECTING CONTRACT 244
RESCISSION 485
SEVERANCE 395

Page
STATUTE OF FRAUDS 256
STATUTE OF LIMITATIONS..... 179
TENANT FOR LIFE.....289, 350, 548
TENANTS IN COMMON.....312, 331
TOWNSITE 134
TRESPASS 639, 698
TRUSTS 360
TUNNEL 661, 669
VENDOR AND PURCHASER..... 466

MINING REPORTS

VOL. XVIII

MUDSILL MINING CO. LIMITED ET AL. v. ORVILLE A. WATROUS ET AL.

(61 Federal 163. Circuit Court of Appeals, Sixth Circuit. Feb. 5, 1894.)

Ore "in sight" means ore blocked out and exposed on at least two sides.

Mode of testing average values of ore by quartering samples, with assays of the final results of the quartering, stated.

Statement as to ore values accompanied by tampering. A bill for the rescission of the purchase of a silver mine on the ground of fraud alleged that defendant represented that the ore therein contained a certain average of pure silver, making it very valuable, whereas in fact the average was so low that it was worthless; and that defendant had "salted" the samples which complainant took from the mine, and upon the faith of which analysis the purchase was made, by fraudulently mixing native silver therewith. *Held*, that, where the latter allegation is sustained, defendant cannot shelter himself behind the plea that his representations were mere expressions of opinion as to the value of the mine.

[1]**Comparison of assays.** In a suit to rescind the sale of a silver mine on the ground of fraud perpetrated by defendant by "salting" the samples of ore taken by complainant for assay, it was shown that there was no native silver in the ore of the mine, but every one of thirty samples taken contained from 80 to 90 per cent. of the ore values in the form of powdered silver. The assays were made at different places and by different persons, but all with substantially the same result. *Held*, that the evidence showed that the presence of this powdered silver in the samples could not have been accidental.

Salting ore in previous instances. In a suit to rescind on the ground of fraud perpetrated by defendant by "salting" samples of ore, upon the assay of which complainant was induced to purchase, it is competent to show that defendant had "salted" samples used in prior negotiations with other persons for the sale of the same mine.

Hypothesis. Motive. Analysis of the process of reasoning known as "hypothesis" and consideration of "motive" as an element of proof.

Sufficient proof of salting. In a suit to rescind the sale of a silver mine on the ground of defendant's fraud in "salting" the samples by means of which complainant was induced to purchase, it was shown that defendant had a substantial pecuniary interest in effecting the sale; that some of the samples were tested immediately after being taken from the mine, in which operation they were put into the hopper of a crusher by complainant, and were received by defendant as they came out, at a point which was out of complainant's sight, while the samples not then tested remained for some days in defend-

---

[1]Buyer making his own examination and assays. *Crocker* v. *Manley*, 164 Ill. 282; 18 M. R. 485. *Henry* v. *Mayer*, (Ariz.) 53 Pac. 590.

Latitude of evidence in investigation of fraud. Prospectus claiming purchase made from "original owners." *Simons* v. *Vulcan Co.* 6 M. R. 633.

Sale induced by salting the dump. *Davis* v. *Henry*, 6 M. R. 680.

Statement that land demised included a certain ore bed, is a statement of fact and not of opinion. *Chatham F. Co.* v. *Moffatt*, 16 M. R. 103.

Defendant, president of two companies, agreed with one of them to buy a large lot of its treasury stock, for which he gave the note of the other company. The note was so executed as to conceal the fact that the defendant was selling the stock to himself. *Held*, personally liable on the note and the corporation not liable. *Wheeler* v. *Mineral Farm Co.* (Colo.) 71 Pac. 1101.

The term "fraudulent" has no meaning if not accompanied by facts which imply fraud. *County of Cochise* v. *Copper Q. Co.*, (Ariz.) 71 Pac. 946.

A party who has the benefit of a private report from an expert, is guilty of fraud in misstating the tenor of such report. *Morrison* v. *Snow*, (Utah) 72 Pac. 924.

ant's exclusive possession and control; that the "salting" was done with powdered metallic silver, such as was easily procurable in the market, and which might have been introduced into the samples with a syringe without breaking the seals of the bags; and that, after the presence of metallic silver in the samples was accidentally discovered, defendant opposed the erection of a mill adapted to its separation, he having an interest in the company for which complainant had bought the mine, and knowing that there was no native silver in the ore. *Held*, that the evidence showed that the "salting" was done by defendant.

[2]**Testing by mill runs no acceptance.** Complainant purchased a silver mine from defendant, and afterwards discovered that the samples by which he had been induced to purchase had been "salted." He at once attempted to pursuade defendant to take the property back, but he refused to do so. Complainant then erected a small mill in order to make more complete tests of the quality of the ore, and also sought to discover evidence to convict defendant of the "salting." He did not reach conviction upon this point until a year after the sale was consummated, and he at once filed a bill for rescission. *Held*, that there was not such a dealing with the property as amounted to a waiver of his right to rescind, nor was he guilty of laches.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This was a bill by the Mudsill Mining Company, Limited, and Walter McDermott, against Orville A. Watrous and Stewart A. Van Deusen, for the rescission of a sale. The Circuit Court dismissed the bill, and complainants appeal.

This is a bill for rescission. The subject-matter of the suit is a mining property known as the Mudsill mine, or group of mines, situated eight miles from the town of Fairplay, Park County, Colo. The complainants have tendered to the defendants a deed to the property, and demanded rescission upon the ground of fraud practiced in the sale. The title to these mines, at the time of the sale, was in the defendant Orville A. Watrous. The defendant Stewart A. Van Deusen was interested in the property by virtue of an indefinite parol agreement, and was the active agent

[2]Mislaying papers no excuse for laches. *Curtis* v. *Lakin*, 94 Fed. 251.

in making the sale. The complainant Walter McDermott is a professional mining engineer and assayist, having offices and carrying on business both in London and New York. In the purchase of the Mudsill mine he, as defendants well knew, represented and acted for himself and others, promoters of a corporation intended to be organized for the purchase and operation of these mines. After certain preliminary negotiations, partly with each of the defendants, a proposition in writing was made for the sale of the mine, under date of October 24, 1887, and signed by the defendant Stewart Van Deusen. After referring to the negotiations and understandings theretofore had, this proposal was, in substance, that McDermott should form a company in England, with capital stock at £75,000 sterling, in 75,000 shares of £1 each; of this Van Deusen was to receive 37,500 shares, of which he agreed to transfer to the company 1,000 shares, to go into the treasury, and to be sold for not less than par value. In addition to the 37,500 shares, the proposal required that he was to receive $110,000, with which he agreed to pay off all mortgages, debts, and claims, of every description, against the Mudsill property. The company is to have a paid-up working capital of 15,800 pounds sterling. The proposal further required the company to erect a first class 20-stamp mill, with amalgamation pans and frue vanners, and that work should begin on the same as early in 1888 as the weather would permit,—not later than May 1st. It concluded by requiring an acceptance of these terms within 30 days from date. The mines in question had been opened and operated to some extent for several years, and an extensive ore body had been developed, and was so exposed as to be capable of measurement, and the cubic contents calculated with reasonable certainty. The bill charges, in substance, that Van Deusen, who was an experienced miner and for many years in charge of the development and operation of this property, represented that the body of ore thus developed, and technically "in sight," amounted to 30,000 tons, and that "an average assay of the ore taken from different parts of the mine, so far as opened, showed thirty-five ounces of silver to the ton;" and that Van Deusen represented, as an inducement to the sale, "that his own estimate, based upon his own knowledge of the mine, was that the real average throughout the whole vein was not less than thirty-five ounces per ton." The bill charges that such a mine as thus represented, with suitable mills and machinery, would be very valuable and productive. The evidence submitted clearly indicates that the commercial value of such a mine, as it is charged this was represented to be, was not less than one-half million of dollars. The bill, in substance, charges that in point of fact the average richness of the ore body "in sight," and estimated at 30,000 tons, was inconsiderable. That the average of the whole exposed mass of ore was so low as to be worthless for milling purposes. It, in fact, charges that the defendants, from long and intimate acquaintance with the property and its history, knew, or ought to have known, that the average assay value of this developed

ore body indicated so low a grade of ore as to make the average ore of no commercial value; that they knew that ore of value sufficient to justify milling existed only in irregular pockets or thin veins, and could only be obtained by the most expensive mining and careful selection; and that the mine, so far as known and developed, was commercially of no value. The preliminary correspondence between McDermott and each of the defendants, as well as the testimony of the parties, shows that McDermott was, before acceptance of the proposal of sale, to go personally to the mine, and be permitted every opportunity for examination and for sampling the ore body, and ascertaining for himself the truth or falsity of the representations made by the vendors as to the value of the property. The bill then charges that complainant McDermott went out to the mine for the purpose of availing himself of the proposal that he should be afforded opportunity to examine the mine, and take samples from the exposed body of silver ores for assay, by means of which he could intelligently exercise his own judgment as an expert as to the probable value of the large mass of ore in sight; that he went into the mine, and took therefrom a large amount of ore, broken from different parts of the mine, in such way as to thoroughly indicate the average grade of ore in sight, and the characteristics of the ore; that he made a large number of assays from the samples thus taken, and procured other assays to be made from the same samples by other competent assayists; that the result of these assays showed that the average richness of the whole of the developed ore body, which his measurements and calculations proved to contain about 30,000 tons, was 34 ounces per ton. These results the complainants allege strikingly corroborated the representations of defendants, and indicated a property of great value. These assays indicated that some 85 or 90 per cent. of the silver value of the ores consisted in native silver, which was found to be present in every sample in the form of finely divided particles, crystalline in character. The bill alleges that the high average of the assays was due to the presence of this native silver, "and was the essential fact upon which plaintiff McDermott determined to purchase the property, and he so informed the defendants." The bill then charges that, in reliance upon the fairness and representative character of the samples thus taken, the property was purchased. The whole of the money payment was made to defendant Watrous, the last payment being anticipated in order to secure title and possession. The deed was made to complainant Walter McDermott as trustee, the company for which he was acting not having completed its organization. Contemporaneously with the execution of the deed, a declaration of the trust upon which he held the deed, and substantially as stated in the proposal of October 24th, 1887, was executed and delivered to Van Deusen. Subsequently McDermott conveyed the property to the Mudsill Mining Company, as under his trust he was bound to do.

The bill now charges that after the completion of the purchase, and

after taking possession of the property, other samples were taken from all parts of the mine, as had been done before, with a view of certainly determining the kind of mill which was best adapted to the reduction of the ore. The assays of this sampling, made in February and March of 1888, demonstrated the startling fact that native silver did not exist in the ores of the mine, and that the average silver contents of the ores, consisting of chlorides and sulphides of silver, was less than seven ounces to the ton. This led to the opinion that the samples upon which the trade had been concluded had been tampered with by a process called "salting," and native silver in the form of fine powder injected into each of the bags containing samples. The complainants now charge that this sampling was done by or under procurement of the defendants, for the fraudulent purpose of deluding and entrapping complainant company into the purchase of a mine of no commercial value. This discovery that the mine contained no native silver in its ores was the result of the assays made upon the resampling done in February 1888, and the conclusion was then entertained by complainants that the presence of native silver in the samples upon which the mine had been bought was the result of "salting." The formal demand of a rescission upon the ground of fraud was not made until April of 1889,—more than one year afterwards. Between these two dates the complainants put up a small mill, and reduced a large quantity of ore, and did much exploration and development work. To avoid the effect of this dealing with the property as an adoption of the contract, the bill alleges, among other things not now necessary to mention, that "all of the time from the moment that the plaintiffs found reason to suspect that they had been fraudulently drawn into the purchase of the property—that is to say, on or about the 25th of February, 1888—had been occupied in efforts to test the property, and fix beyond question its actual value, and to search for evidences of the fraudulent practices of the defendants, for the purpose of seeking the relief prayed for in this action." "Ever since it has had possession of the said mining property, the plaintiff company has prosecuted a thorough examination of it, and made repeated assays of fairly selected samples of the ores therefrom, with the result that the ores have been proven to be of an average value of about four ounces to the ton, and that there is no native silver in the ore vein." "Repeated attempts were made to induce the defendants to settle, on some equitable basis, the apparent difference between the represented and the actual value of the property." The bill prays (1) for a decree rescinding the contract of sale, and for a decree against the defendant for the entire sum of purchase money paid him, with interest; (2) that defendant account for all stock received and sold by him; (3) for general relief. The circuit court dismissed the bill.

SIDNEY D. MILLER (JOHN H. BISSELL and OTTO KIRCHNER, of counsel), for appellants.

CHESTER L. COLLINS (BENTON HANCHETT and T. F. SHEPARD, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and RICKS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The evidence in this case is voluminous, covering more than 2,000 pages of the record. Any detailed statement of the testimony upon controverted questions of fact would be unprofitable, and extend this opinion to an unwarrantable length. The specific grounds upon which relief is sought are as follows: (1) That the defendants falsely and knowingly misrepresented the value of the mine and the average silver contents of the ore "in sight;" (2) that the examination and sampling of the mine done by complainants was rendered abortive and misleading by the wilful and fraudulent conduct of defendants in secretly and fraudulently procuring the admixture of native silver which does not exist in the ores of the Mudsill mine, with the samples of ore taken by complainants from that mine; (3) that the complainants, in reliance upon the representations of the defendants, were, by their active fraud and deceit, led to purchase the mine in question, and part with their money in payment of the purchase price; (4) that the average silver contents of the ore "in sight" at time of sale has been by subsequent developments demonstrated to be less than eight ounces per ton, and the mine therefore of no commercial value whatever.

The evidence, in our judgment, thoroughly establishes that the representations made by defendant Stewart Van Deusen pending the negotiations for sale, and while acting for himself and the defendant Watrous, were, in substance, as follows: (1) That the ore body developed so far as to be technically

"in sight" (meaning thereby ore-bearing rock so separated and blocked off by being worked around on two or more sides that it was subject to examination and measurement) was 30,000 tons. This representation was substantially confirmed by the examination measurements, and calculations of complainants before the sale was consummated. (2) That the average silver contents of this 30,000 tons of ore was not less than 35 ounces of silver per ton.

It is perhaps too well settled to admit of controversy that a misrepresentation, in order to constitute fraud, must be an affirmative statement of some material fact, and not a mere expression of opinion. *Gordon* v. *Butler,* 105 U. S. 553; *Development Co.* v. *Silva,* 125 U. S. 247, 8 Sup. Ct. 881. This distinction between the misrepresentation of a fact and the expression of an opinion is peculiarly applicable in the sale of a property so speculative and uncertain as a silver mine. In *Jennings* v. *Broughton,* 17 Beav. 234, which was a case brought to set aside the sale of shares in a mining venture on account of fraud in the sale, Knight Bruce, L. J., said:

"First, in the statements or representations concerning the mine, was there any untrue assertion material in its nature; that is to say, which, taken as true, added substantially to the value or promise of the mine, and was not evidently conjectural merely?"

The representations made verbally, and which it is alleged were false, related alone to the average richness of the exposed body of ore. Though in form the affirmation of a fact, yet, when applied to the subject-matter of the negotiation, it was in its very nature conjectural, and amounted to an expression of opinion. But this rule that a mere expression of an opinion will not constitute fraud must not be pushed beyond the reason for the rule. If a false statement is to be given immunity because it is mere "puffing" or "trade talk," and only the expression of an opinion, it is because the party to whom the opinion is addressed has no right to rely upon the mere ex-

pression of an opinion, and is assumed to have the ability and opportunity of forming his own opinion and coming to an independent judgment. In speaking of the difference between the legal effect of a representation as to a fact and the expression of an opinion, Mr. Pomeroy says:

"The reason is very simple: While the person addressed has a right to rely on any assertion of a fact, he has no right to rely upon the mere expression of an opinion held by the party addressing him, in whatever language such expression be made. He is assumed to be equally able to form his own opinion, and to come to a correct judgment in respect to the matter, as the party with whom he is dealing, and cannot justly claim, therefore, to have been misled by the opinion, however erroneous it may have been." Pom. Eq. Jur. § 878.

If, therefore, the party making false statements as to a matter conjectural in its character, and therefore relating to a matter of opinion, actively intervene to prevent investigation and the discovery of the truth, and such intervention be effective in the concealment of the facts and in the deception of the buyer, a clear case of operative fraud is made out. In every such case immunity will not be extended to false expressions of opinion, upon the ground of "puffing" or "trade talk," if it appear that the vendor has, by his conduct, prevented investigation, and induced reliance upon the statements of the seller. In such a case the subsequent conduct of the seller in actively preventing the buyer from the formation of an independent opinion so connects itself with the original misrepresentation as to become part and parcel of the false statement, and amounts in law to the false affirmation of a fact. A false representation may, and most often does, consist in language alone, expressed or written; but it may also consist in conduct alone, or external acts. Whenever the purpose is to induce belief in the existence of a fact which does not exist, every word and act intended to produce conviction and induce action becomes a misrepresentation if through their instrumentality, the party upon whom they

are practiced is induced to act. 2 Pom. Eq. Jur. § 877. The gravamen of the alleged frauds lies in the allegation that when the complainants undertook to examine this property, and form an independent judgment as to its value, through the active and wilful intervention of defendants, their samples were rendered untrustworthy by the secret admixture of silver in a form in which it did not exist in this mine; that the purpose was to give to these samples, otherwise representative of the average value of the ore in sight, a false and fictitious value, which would confirm the untrue statements expressed theretofore as to the silver contents of the mine. Now, it must be evident that, if this was done, a most abominable fraud was practiced, and that no court would suffer a contract resting upon such a foundation to stand. The evidence upon which it is sought to establish this fraud is almost purely circumstantial. We may assume that two important facts in the chain of circumstances are so thoroughly proven as to be treated as practically conceded—First, that in each bag of samples taken by complainant McDermott, and under his personal supervision, there was subsequently found a large per cent. of practically pure silver, in the form of a very finely divided powder; second, that the ores of the Mudsill vein contained no native silver whatever. From these two facts the conclusion is inevitable that this native silver in the samples taken by complainants as representative of the exposed ore body did not come from the Mudsill mine, and was therefore an admixture operating to make the assay results obtained from those samples wholly unrepresentative and misleading.

Was the presence of this native silver in these samples accidental, or was it placed in the bags designedly? One or the other of these hypotheses must be true; no other can be suggested. Upon the hypothesis of accident what can be said? The doubt expressed in the opinion of the Circuit Court as to whether the metallic silver found by the assayist, Young, and by McDermott, was the product of the October

samplings, is based upon the suggestion "that a week intervened between the test and the discovery of the metallic silver, during which the work of testing ores was carried on continuously in the ore-milling and testing works." There is not the shadow of a doubt engendered by the fact referred to. The intimation is that this fine silver powder might have accidentally gotten into the October Mudsill samplings from tests or assays of other ores which might have contained this form of silver. (1) There is not a particle of evidence that any other ore tested in the assay establishment of Mr. McDermott had shown the presence of native silver in that form. (2) Both McDermott and his assistant, the witness Young, say the discovery of this metallic silver in this form was a great surprise. It was to them an unusual occurrence. (3) The witness Young, whose testimony is referred to as suggesting the possibility of an accidental intrusion, by his statement that it was perhaps a week between the test and discovery of the metallic silver, says: "We never started another test until that was finished; we worked on one test until it was completed before we started another; in other words, we took one test at a time." (4) The history of the discovery of this metallic silver, as detailed both by McDermott and Young, completely explodes the suggestion. Its presence was not discovered in the assays. Silver in every form entered into the assay result, but no test for native silver was made in the earlier assays made by McDermott, Young, Arthur Van Deusen, or Burlingame. After the ores had been sampled down,—that is, crushed, mixed, and divided and redivided to get small samples, representative of the larger ones,—the remainder not accepted or desired for assay purposes was used to make what are designated as "mill tests;" that is, the ores are treated precisely as they would be on a larger scale at a reduction mill. The crushed ores in this instance were first put through the stamp mill, by which they were reduced to a powder. A sample of the

ore after it came from the stamp mill was assayed. The ores intermingled with a stream of water, then ran over the copper plates in the troughs, which carried off the lighter materials. The passing over copper plates was in this case accidental, as it was not usual to so treat silver ore in a milling test, and the plates had not been placed for that purpose. After the pulverized ore had been subjected to this washing, it was again tested by an assay. These tests, made after passing over the copper plates, developed a very remarkable discrepancy between the assay of the pulverized ore before and after it had passed over the copper plates. This led to an investigation, which developed the fact that large quantities of metallic silver had been deposited on the copper plates. The fact of this discrepancy between the assay after pulverization, and before passing over the copper plates, and the assays after passing over the copper plates, led to the discovery of the native silver, and demonstrates the want of substance in any suggestion that the native silver might have been intruded from other samples by accident. (5) When complainant McDermott brought his samples from the mine to Fairplay, they were left in an ore-crushing mill belonging to the defendant Van Deusen over-night. The next morning some bags of the poorest class of ore were then crushed, and one sample of rich ore. These bags thus crushed were separately sampled down in the manner above indicated, and small samples from each lot obtained for assay purposes. These samples were then subdivided. One part was given to Arthur Van Deusen, a brother of the defendant Stewart Van Deusen, for assay; another portion was taken by McDermott to Denver, and given to Mr. Burlingame, an assayist in the public assay establishment in that city. Neither Arthur Van Deusen nor Burlingame tested for native silver, and neither reported any. The assays made by them were, however, highly satisfactory, and indicated that the poorest of the ore body was very valuable; the average silver

contents in the six samples submitted to them for assay indicating an ore running about 27 ounces to the ton. Arthur Van Deusen's assays ran something higher. Burlingame did not assay the whole of the sample sent him, retaining, as is usual, a part as a means of verifying his first assay. These check samples were assayed afterwards by Mr. West, who found in them a large per cent. of native silver, corresponding in character to that found by McDermott and Young in the samples assayed or tested in New York. It is therefore demonstrable that, if the presence of native silver in these samples was due to accident, the accident occurred before the samples left Fairplay. (6) The hypothesis of an accidental admixture is weakened by the number of instances in which it must have occurred. If metallic silver had been found in only one or two tests or assays out of a large number, or it had been found in only one or two of the thirty or more samples from different parts of the mine, an accidental origin might seem possible; but when every test made on the October samples for the purpose of ascertaining its presence indicated a like "accident,"—when it was found in the samples taken from all parts of the mine and kept in separate parcels, and in all instances to represent from 80 to 90 per cent. of the total silver contents of each sample,—the theory of accident ceases to be believable, and the hypothesis of design is established. The frequency of the "accident" and the uniformity of its characteristics is contrary to all human experience, and justifies the utter rejection of the hypothesis of accident, and the acceptance of the only other possible theory, which is that it originated in design. Who was the designer? By whose instrumentality was this admixture brought about? Here, again, we are without any affirmative testimony as to the perpetrator. If the hidden hand is to be discovered, it will be alone by the rightful use of a mass of circumstances in evidence which form the res gestae of a most mysterious and abominable fraud. All the evidence

touching upon this aspect of the case is to be weighed in the scale of natural logic. "Each piece of evidence * * * is to have the weight attached to it by sound reason, unfettered by artificial rules." We know of no other way to try a question of fact dependent upon circumstantial evidence. Fraud, it is said, must be proven, and not presumed; yet fraud, like all other questions of fact, may be, and in most cases is, made out by circumstances from which the main fact is inferred. No witness has been introduced who testifies that he saw this metallic silver intruded into these bags of samples; yet circumstances so strong in their nature may be produced as to satisfy the mind and conscience that the guilty man is pointed out. As to the uses and character of circumstantial evidence, Mr. Sheldon, in his very valuable treatise upon the Science of Jurisprudence, has said:

"From whatever cause, the fact in question cannot itself be approached; but the surrounding facts, past, present, or succeeding, may have been seen, heard, or felt, either by the investigator, or by somebody else more or less likely to speak the truth about them. Circumstantial evidence is, then, the sort of evidence to a fact taking place which is supplied, not by anybody having observed it taking place, but by a number of other facts or circumstances having been observed which are held to furnish a legitimate ground for an inference from them to the fact in question."

We shall again resort to the hypothesis as a means of testing the evidential value of facts tending to discover the instrumentality by which these samples were "salted." "Hypothesis," to quote from Lindsay's translation of Uerberweg's Logic (section 134), "is the preliminary admission of an uncertain premise, which states what is held to be a cause, in order to test it by its consequences. Every single consequence which has no material truth, and has been derived with formal correctness, proves the falsehood of the hypothesis. Every consequence which has material truth does not prove the truth of the hypothesis, but indicates for it a growing probability which in case of corroboration, without exception,

approaches to a position where the difference from complete certainty vanishes. The hypothesis is the more improbable in proportion as it must be propped up by artificial auxiliary hypothesis. It gains in probability by simplicity, and harmony or (partial) indentity with other probable or certain presuppositions." Subject to the conditions thus stated, the hypothesis has been of great value in the extraction of scientific truth, and, says Mr. Wharton, in his very scientific work upon Evidence, "is of no less value in the extraction of juridical truth." That author vindicates in a most satisfactory way the use of the hypothesis, and sums up his conclusion by saying that "juridical conviction may be therefore defined to be the fitting of facts to hypothesis. If, in criminal issues, there is reasonable doubt whether the facts fit the hypothesis of guilt, then there must be an acquittal. In civil issues, when there are conflicting hypotheses, the judgment must be for that for which there is a preponderance of proof." Whart. Ev. § 14.

If we are right in the conclusion that the metallic silver found in McDermott's October samplings was not the result of accident, and is therefore attributable to a human agency, the admixture being by design, then there are two opposing hypotheses which cover every possible solution of the next step in this investigation. The first is that which the complainants must establish or fail in their case, and is, that the defendants, or one of them, or some one at their procurement, placed the native silver in the October samples taken from the Mudsill mine. The second, or opposing, hypothesis, is, that the admixture was done by some unknown person, and not with the procurement, knowledge, or consent of the defendants, or either of them.

The Motive. The first fact which tends strongly to support the hypothesis of guilt of the defendants is that they had a strong motive to induce such action. If Van Deusen's proposal was accepted, its results would be $110,000 in money,

to say nothing of the use which could be made of the shares to be assigned them in the new corporation. How this money was to be distributed, and how it was in fact distributed, is left very indefinite by the evidence of the defendants, who could, if they had chosen, have made this very plain. This much we do learn, and that is that Stewart Van Deusen received at least $10,000, and probably much more, while Arthur Van Deusen, a brother, also received $10,000. This mining property, while owned by the East Leadville Mining Company, had been mortgaged for a loan of $8,000. Stewart Van Deusen induced the defendant Watrous to buy the claim thus secured. Arthur Van Deusen was the trustee under the mortgage, and Stewart Van Deusen was the owner of one-fourth of the stock in the East Leadville Company, and its resident general manager. Watrous was invited and urged by Stewart Van Deusen to buy in the property at the trustee's sale, which he did for the amount of his debt. Certain other debts of the Company, in judgments, and liens, also seem to have been paid off by Watrous to protect his title. The precise character and amount of these other debts is left in a very indefinite and unsatisfactory shape by the evidence of the defendants. The full facts were manifestly known to them. From what is to be gleaned from the guarded statements made as to these other debts, it is inferable that they amounted to but a few thousand dollars. Thus a property which had cost the East Leadville Company more than a hundred thousand dollars passed into the hands of defendant Watrous for perhaps not over ten per cent. of what the Leadville Company had paid for and expended upon it. There is evidence that the company then owned personal property ample to have paid the claims through which Watrous acquired the property. Curiously enough, Stewart Van Deusen turns out to have some vague and indefinite parol agreement with Watrous, by which he is to share in the purchase with Watrous, or receive a share in the proceeds when sold. This

share, according to Watrous, was to be subject to future adjustment, though Van Deusen says, in one portion of his evidence, that the understanding was that he was to share equally. After the sale, Van Deusen remained in possession of the property, and continued the work of developing the mine, Watrous furnishing the money. A large part of the time of defendant Stewart Van Deusen was thereafter occupied in endeavoring to find a customer for the property. During this time he was supported by Watrous, who seems to have honored all of his drafts for his own support, as well as for expenses incident to the development of the mine and of a purchaser. All the obligations incurred in this way by Stewart Van Deusen were paid by this sale. Arthur Van Deusen was likewise deeply interested in a sale. He remained on and about the property, receiving during the time between the purchase of Watrous, in July, 1884, and the sale to complainants, in December, 1887, from his brother, as he states, but a few hundred dollars, but was to receive, in case of a sale, $150 per month from 1882 down to time of sale. Thus he was to be paid for about two years before Watrous bought the property. This is the way he accounts for his share in the proceeds of sale, which he says his brother paid to him in March, 1888. His own account of it is that he was paid in a check on Watrous' bank. He says: "Mr. W., my brother, and I walked to the bank, and they gave me the money." The circumstances attending the acquirement of this property—if it had any such intrinsic value as Van Deusen subsequently professed to believe—by Watrous for so insignificant a sum, coupled with the interest which the agent of the debtor company is developed to have had, furnish a strong presumption of a breach of trust by defendant Van Deusen towards the East Leadville Mining Company, and a reason for the placing of the title in Watrous with a parol understanding as to the interest the guilty trustee should thereafter have in the property. Watrous seems

to have had no practical knowledge of this mine, and he probably entertained an honest opinion that it had great possibilities. The interest of Van Deusen was to make him think so, and he doubtless was not neglectful in this regard.

The effect of the proof in regard to the real opinion entertained by the defendant Van Deusen as to the value of this property leads us to these conclusions: (1) That he knew that the average silver contents of the ore "in sight" was nothing like so much as he represented it to be to complainants; (2) that he did entertain the opinion that the ore "in sight" might be profitably worked by a company with large capital, and supplied with extensive milling machinery, by which low-grade ores could be worked economically; (3) that he entertained a hope, natural to all connected with such enterprises, that further working and development might develop a higher grade of ores than those in sight. He had, since 1882, been intimately connected with this mine as manager. He was therefore not ignorant as to its past history, or as to any fact which could be discovered by examination or assays. He knew that the preceding owners, the McLean Mining Company, and the East Leadville Mining Company, had expended more than $100,000 in developing and working the mine, with a yield of less than $5,000. He knew that ore of a grade equal to that which he represented as the average of the whole ore body in sight had been found only in small pockets or thin streaks, and that the great body of the ore, in which was found an occasional pocket or a thin rich streak, was of very low grade. His own experience as manager, and with contractors, had been such as to leave him with no doubtful opinion as to the necessity of very careful selection of the rich ore from the poor ore, and that the ore of a grade equal to that which had been taken out and shipped to stamping mills was scarce, and that no reliance could be placed in a sufficiency of such ore being obtained

to run even a very small mill. He knew that a mill erected at the mine would have to rely upon the average ore, and that it was of low grade, not approaching his representations as to its richness. Doubtless he entertained a hope that richer ores might be found, and that by economical processes the aggregate value of the ores, developed and undeveloped, if milled on a large scale at the mine, would ultimately prove profitable. Actuated in part by this hope of a richer development, wholly unjustified by facts connected with the past history of the mine, which would ultimately justify any representations he might make, he sought for a purchaser. His interest in getting his debts paid, his sharing in the cash to be received, and his hope that with plenty of capital the mine would prove profitable, furnished a powerful motive to mislead an intending purchaser as to the probable value of the mine he was undertaking to sell. The existence of a motive to perpetrate a crime or a fraud by no means establishes the complicity of the person having the motive. It is, however, an element for consideration.

The Opportunity. Did Van Deusen have an opportunity to mislead complainants by "salting" their samples? This is a necessary step in considering the hypothesis which presupposes his guilt. If he did not, then the hypothesis is worthless. McDermott occupied three days in examining this mine and taking his samples. The first day was spent in an examination of the mine as opened. He was accompanied by defendant Van Deusen. The next two days were spent in sampling the exposed ore body. He was assisted in this by two experienced miners, long in the employment of Van Deusen. His effort was to so sample the mine that the average value of the 30,000 tons of exposed silver-bearing ore should be indicated. He therefore broke down the exposed surface clear across the exposed vein. This would, of course, include any rich streak, as well as the poorer ore within which it was embraced. He took his samples from many

places in the mine, the total number taken being 31, making 33 bags of ore in all. As each sample was broken down, it was placed in sacks, described as ordinary sacks such as used for ore in Colorado. The material is described as "canvas and gunny sacks; chiefly canvas." The sacks were furnished by Van Deusen, and were branded in stencil, "Mud-sill." In each sack was placed a paper with a memorandum showing the place in the mine from which it was taken. Each sack was then sealed up by complainant McDermott "by means of a twisted wire, which was passed through two sides of the sack, and twisted twice around the neck of the same, then secured by means of small lead seal with two holes through it, which was forced onto the twisted wire by the pressure of a tool I had for the purpose of giving at the same time a clear impression on the lead seal, having upon it two letters, M. & D." These sacks, as thus secured, were left in the mine until the fourth day, when they were removed by wagon, accompanied by McDermott, to Fairplay, a village eight miles from the mine and on the railroad. The ore reached Fairplay after dark, and was placed for the night in an old crushing mill owned by defendant Van Deusen, where it was locked up. The next morning McDermott, accompanied by the two Van Deusens and the two men who had assisted in taking the samples, went to the mill. Eight of the sacks were opened, and there crushed in Van Deusen's mill for the purpose of obtaining assay samples. After taking twenty-five samples in the mine, McDermott took other samples as a check on those, and, as he states, for the special "purpose of determining the character of the rock and certain portions of the vein which appeared to be of very low grade," and which he says he "found could not contain value sufficient to pay for working." The twenty-five samples first taken, McDermott says, he regarded as fairly indicating the general average of the exposed ore. The last eight samples, with one exception, he regarded as representative of the poorer

ores. Six of these eight samples last taken he decided to test before leaving the mine, "so that he could cable to London, the prospects of the average samples." The samples thus selected for crushing in Van Deusen's mill, he says, represented with one exception, what he was convinced was the lowest grade of ore in the mine. McDermott personally selected the sacks to put the crushed ore in, by turning them inside out and dusting them. The ore to be crushed was dropped by McDermott into the rock breaker, and from that dropped into a pair of crushing rollers, which reduced it so that no piece was larger than three-eighths of an inch cube. The ore as it fell from the crushing mill was received in the sacks prepared for it, "and each sample, as completed, was set out in the center of the floor by the defendant Van Deusen until the whole six samples had been crushed." Each sample was then taken by Van Deusen and McDermott, and spread on a large oilcloth and thoroughly mixed, so as to make a homogeneous mixture of the fines and the coarse resulting from the crusher. "It was then divided into four quarters, the two opposite quarters being thrown away until reduced to a size which could be handled on a special sampling machine, which consisted of a sort of charcoal shovel. One-half of the ore passed through between the solid portions of the shovel, the other remaining on it, so that one-half was retained in that way, and was thus reduced to about four pounds, representing a fair average grade of the whole 60 to 200 pounds of the original sample. This small sample was divided into two, and placed in paper bags." Each sample was separately crushed, and a small sample of each of the large samples obtained in the way above described by complainant McDermott. In this way six small samples were obtained in duplicate from the six large samples. One bag of each of the small samples was given to the defendant Stewart Van Deusen for assay by his brother Arthur Van Deusen. The paper bags of samples were numbered from 1 to 6. An

assay was made at once by Arthur Van Deusen, the result being as follows: No. 1, 26 ounces per ton; No. 2, 30 ounces per ton; No. 3, 29 ounces per ton; No. 4, 27 ounces per ton; No. 5, 55 ounces per ton; No. 6, 40 ounces per ton. The six duplicates were taken by complainant McDermott to Denver, and were assayed for him by Mr. Burlingame. He reported the following results: No. 1, 11 ounces per ton; No. 2, 19.70 ounces per ton; No. 3, 25.50 ounces per ton; No. 4, 36.50 ounces per ton; No. 5, 42.70 ounces per ton; No. 6; 26.50 ounces per ton. Neither made any test for native silver, and neither reported any, though the check samples retained by Burlingame were, about the middle of March, 1888, assayed by Mr. West, who then found large quantities of native silver in them, corresponding in character to that found by McDermott in all his samples assayed in New York. On the strength of these assays McDermott cabled his associates in London his satisfaction with the outlook. The crushed ore not used was resacked and sealed. These sacks, together with the sacks of uncrushed ore, were left in charge of defendant Van Deusen, with directions to send the sacks of crushed ore by express, and the rest by freight, to New York. This was done, and they arrived there in due time, without any appearance of having been tampered with. In the subsequent testing of the ore thus shipped to New York the presence of native silver was found to account for from 80 to 90 per cent. of the silver contents. This discovery was made late in November following.

The question we have to deal with is as to the opportunity afforded defendant Van Deusen to "salt" or have these samples "salted" before they passed from under his control. Complainant McDermott very frankly and confidently expresses the opinion that his samples had not been "salted" when the process of crushing began upon the morning after the ores reached Fairplay. He bases his opinion upon the appearance of the sacks, and upon the more important fact

that the ore he there crushed was in lumps, and that as he took each lump out of the sack "he dusted it off" to remove the fine particles before dropping it into the rock breaker. His judgment is that this would have removed any silver in such a powdered form as that subsequently discovered. Accepting this conclusion, it settles the fact that the ores had not been tampered with either at the mine or at the mill the night before, and we need not consider the opportunities afforded the defendants of access up to the time that McDermott began the crushing of certain of his samples the day after they reached Fairplay. Between the time that the process of crushing began and the completion of the preparation of the small samples was there an opportunity to have placed this powdered silver in the ores crushed? Undoubtedly, there was. About one-half of the area of the mill floor was under an upper floor, open in front, so that the floor of the mill not under this upper floor or platform was open to the view of any one on the upper floor. McDermott's bags of samples were on this platform or second floor. The mouth of the rock breaker was on that floor. On that floor McDermott stood, putting his samples, rock by rock, into the crusher. The samples went into the crusher on one floor, and came out of the hopper on the floor below, at a point not within the observation of McDermott. On this lower floor the crushed ores were received by the defendant Van Deusen, who, as each sample was crushed, would unhook the bag into which it fell as crushed, and set it out on the mill floor at a point within the observation of McDermott. While the defendant was engaged at the lower extremity of the crushing machinery, he was not, by the great weight of the evidence, within sight of McDermott, who was feeding the mill above. During this opportunity it was altogether possible to clandestinely place enough metallic silver in each bag to greatly increase the apparent value of the sample. After the six samples were crushed, the entire lot of crushed

and uncrushed ore passed from under the observation and control of McDermott, and was left in the care and custody of the defendant Van Deusen for shipment. Thus he was afforded access to the bags of uncrushed ores, and with proper means could, before the shipment of these bags, have added to each sample such quantity of native silver as, with the natural silver contents, would bring its gross silver value up to a value corresponding with his representations.

The Means. The material used for "salting" was a finely divided form of metallic silver, resulting from the precipitation of silver held in solution. The particles were nearly as fine as flour, though under the microscope they were crystalline in character. The process for the reduction of silver ores employed by some reduction mills involved the production of just such a powder as one stage in the reduction to bullion. This was notably the case at the Boston & Colorado Smelting Works, at Argo, Colo. Just such a form of silver could be bought from that company, and was in fact bought and produced in evidence in this case. This silver, mixed with the crushed or uncrushed ore, would by contact lose its brightness, and take on the color and stain of the sample. In that condition its presence could only be detected by a microscope or a test made, having such a discovery in view. Its general resemblance to crystalline native silver found in some silver ores was such as not to excite any suspicion. An ounce of this powder mixed with a hundred pounds of the average ore of the Mudsill mine would operate to add twenty ounces per ton to the apparent silver contents of such ores. But a moment was needed to empty the required quantity of this material in each sack of ore as it was taken from the lower end of the crushing rollers by defendant Van Deusen. The unopened sacks could have been "salted" by forcing the point of a syringe or funnel through the meshes of the coarse canvas sacks, and squirting the fine silver in and upon the contents. The subsequent crushing and mixing intended to distribute

the coarse and the fines, the richer and the poorer ores, as evenly as possible, would operate to distribute this foreign material more or less evenly through the mass. That in the handling of the bags during shipment some part of this fine metal might have escaped through the sacks is possible. That enough remained to make these samples worthless as representative of the ore body was subsequently made most evident.

It is manifest from the foregoing that the defendant Van Deusen had a powerful motive to induce such an admixture, and that the opportunity and means existed, if he chose to avail himself of them, to accomplish his end. While other persons had the same opportunities and access to the same means, the defendants alone had any motive or interest in "salting" these samples. The interest of complainant McDermott was to get at the true value of this property. He was buying for himself as well as for others, and no possible motive is suggested which would account for his complicity in such a fraud. It is possible that some one, from enmity to him, or those with whom he was acting, might have sought a mean revenge in this way. Such a possibility is not to be seriously considered when there are no facts shown indicating the operation of such a cause. Having established that this metallic silver was, by design, placed in these samples, the hypothesis propounded by the complainant—that the defendants were the designers—is supported by these circumstances (1) that they had a powerful motive inviting just such a fraud; (2) that Van Deusen had access to the samples at a time antecedent to the first assays made from them; (3) that the means necessary to the commission of the fraud were accessible to them; (4) that no other person or persons had any motive or interest in committing such a fraud; (5) no one could hope to profit by the admixture, other than the defendants.

We shall not stop now to consider the probative effect of these facts in establishing the hypothesis presupposing the guilty agency of the defendants. There are other circum-

stances entitled to consideration before a conclusion is reached. Pending the purchase, defendant Van Deusen informed complainant McDermott of three examinations and samplings other than that by Rathbone, made for intending purchasers by disinterested mining engineers, and also of the assay results from those samplings. The examinations referred to were those made by John B. Farrish, Ridley and Stanton, and a man named Jacobs. Farrish's report showed, as McDermott stated, 30,000 tons of 30-ounce ore in sight. In this connection he said that Farrish's estimate was a little lower than the actual average, and that 35 ounces would be nearer. Subsequently, when McDermott embodied this statement as to Farrish's report and examination in a prospectus for the new company, Van Deusen corrected him, in a letter dated November 19, 1887, in which he said that Farrish had told him that there was 50,000 tons of ore in sight, of an average value of 40 ounces of silver to the ton. He represented Ridley and Stanton as reporting 40,000 tons of 45-ounce ore. This, too, was corrected and enlarged in the letter referred to, so as to raise the ore in sight to 57,000 tons. The Jacobs report he said showed 50,000 tons of 50-ounce ore. This is changed by his letter to 46,000 tons. The confidence placed in these statements of former estimates and assays is indicated by the fact that McDermott embodied two of them in the proposed prospectus for the new company, prepared while en route from the mine in October, 1887, and embodying the conviction then entertained by him as to the value of the property from all he had heard and seen. Evidence has been introduced tending to show that one of these reports, and possibly a second (of the three mentioned above), which found a place in McDermott's prospectus, were the product of frauds of like character to that charged in this case. Its competency for this purpose will not admit of controversy. If defendant Van Deusen used these reports for the purpose of inspiring confidence in the value of this mine, and in the truth of his own representations as to its value (about which we have no doubt), then it was

competent to show that these reports had their own origin in fraud concocted and executed by the man who thus pretended to rely upon them as bottomed upon representative ores of the mine he was trying to sell. It is likewise competent as tending to sustain the hypothesis presupposing the agency of defendants in corrupting the samples taken by complainants. That defendant Van Deusen interfered with samples taken by other intending purchasers does not of itself prove that he was guilty of like conduct in subsequent efforts to sell; but, when subsequent samples are shown to have been tampered with by somebody unknown, the fact that defendants, in former efforts to make sale of the same property, had resorted to just such frauds in order to sell, becomes competent and cogent evidence tending to establish their complicity in the like fraud now under consideration. Did they believe that they had a valuable property? Did they believe it was of the value they represented it to be? Were they acting in good faith in holding this property out as having a great commercial value? Or, on the other hand, did they believe the property could only be sold by giving it a fictitious value through the means of fraudulent samples! Their former efforts to make a sale by resorting to fraudulent interferences with the samples taken by experts acting for possible buyers so connect themselves with the last effort to make a sale as other acts in furtherance of the same general design. It is not, in such a case, essential that these former acts of fraud were not contemporaneous with the transaction under inquiry. If they were frauds of like character, and especially if they concerned former efforts to sell the same property, they are admissible. Remoteness in point of time may weaken their evidential value, but will not ordinarily justify exclusion. The case of *Hoxie* v. *Insurance Co.*, 32 Conn., 21, is directly in point. There the court said:

"Upon the question of good faith, knowledge, or intent, any other transaction from which any inference respecting the *quo animo* may be drawn is admissible; and where fraud is imputed, and within the issue,

and provable by various circumstances, a considerable latitude must be indulged in the admission of evidence. * * * It has sometimes been thought that the other transactions should be contemporaneous, or nearly so; but that is not essential. A fraudulent combination and fraudulent motive may be inferable from a series of successive transactions of a fraudulent or suspicious character and in respect to such a subject-matter."

Ross v. *Miner,* 67 Mich. 410, 35 N. W. 60; *Rafferty* v. *State,* 91 Tenn.,655, 16 S. W. 728; *Bottomley* v. *U. S.,* 1 Story, 136, Fed Cas. No. 1,688; *Jordan* v. *Osgood,* 109 Mass. 461; *Castle* v. *Bullard,* 23 How. 174; *Butler* v. *Watkins,* 13 Wall. 457; *Insurance Co.* v. *Armstrong,* 117 U. S. 598, 6 Sup. Ct., 877; *Blake* v. *Assurance Society,* 4 C. P. Div. 94.

In the case last cited, Lindley, J., said:

"I agree that, in order to prove that A. has committed a fraud on B., it is neither sufficient nor even relevant to prove that A. committed fraud upon C., D., or E. Stopping there, I admit that proposition; but, let it be shown that the fraud on B. is one of a class of other transactions having common features, then I disagree altogether with that proposition."

The testimony admissible upon the priciples above stated is that of the witness Wardle, who was railroad and express agent at Fairplay from March, 1883, to October, 1886. That witness testified that, upon three several occasions, bags of ore samples in the depot at Fairplay for shipment, and being samples taken by experts for possible buyers, were tampered with by the defendant Stewart Van Deusen and his brother Arthur Van Deusen, assisted by witness. These cases occurred in 1884 and 1885. The first lot of samples as to which he testifies he describes as having been taken by a Mr. Loth, in the summer or fall of 1884. Loth's samples were in the depot in bags, tied with cords. The sacks were untied, and other ore, previously put in the depot by the Van Deusens, was substituted for ore taken from the bags. The second instance occurred afterwards. The name of the expert taking the samples was not known to the witness. The bags had

been tied and sealed with ordinary sealing wax, stamped, as if with the back of a knife blade, with three straight lines. The seal was broken, the bags untied, and the substitution of one ore for another was made, and the original seal duplicated. The third instance was with reference to the lot of samples taken by J. B. Farrish in the fall of 1885. The samples were in small bags, inside a large one. The big sack was fastened and sealed with wax stamped with the letter F. The small sacks were sealed the same way. These sacks were opened at bottom, an exchange of part of the contents made, and again sewed up. Witness says that defendant Van Deusen explained that this substitution was in each case made to improve the average and induce a sale. The testimony of one who admits himself an accomplice is, of course, to be cautiously received. The character of the witness is also attacked by evidence going to his general reputation. He is, on the other hand, supported quite strongly. His evidence has been carefully scrutinized. It contains many inherent marks of honesty. It accounts for high averages obtained by former examinations, which, in the light of the history of this mine, and the other facts of this case, would be inexplicable. The testimony fits into the surroundings so much like truth that we are led to accept it as worthy of consideration.

The conduct of the defendant Van Deusen after the discovery of metallic silver in McDermott's October samples has been relied upon by the complainants as full of suspicion, while the defendants, on the other hand, claim to find in it very high evidence of innocence. We think it is explained by a consideration of the very embarrassing circumstances incident to the unexpected discovery of the native silver in those samples. If it be assumed that he had a guilty agency in the matter, was there anything in his conduct which tends to corroborate or weaken the assumption? Mr. Van Deusen could well assume that it was not likely that the presence of native silver in McDermott's samples would be discovered. Neither

Burlingame nor Arthur Van Deusen reported any such discovery. Very many assays were made by McDermott and Assayist Young, without its presence becoming known. The accidental presence of some copper plates in a milling test produced a precipitation of the metallic silver upon the plates. A discrepancy between assay results before the powdered ore passed over these plates of copper resulted in a "clean-up," and the discovery of the precipitated silver. This discovery was a surprise to Van Deusen, and his whole after-conduct was influenced by the necessity of confirming McDermott's opinion as to the gross contents of the ores in the mine, while preventing him from putting up a mill built with a special view to the saving of free metallic silver by the screening process. This antagonism in the ends he sought was the result of McDermott's discovery that from 80 to 90 per cent. of the silver contents of the ore could be cheaply and certainly saved by a screening mill instead of an amalgamating mill. The proposal for a sale required the buyer at once to erect a 20-stamp mill with frue vanners. Such a mill was more expensive, and not so economical in its operation as a screening mill. If, as McDermott's samples showed, the average silver contents of the Mudsill ores was 34 ounces of silver per ton, and if, as his tests demonstrated, 80 per cent. of the silver contents was in the form of metallic silver, and could be saved by screening, then it was clear that a mill adapted to screening the ore, and thus eliminating the free silver, was the proper mill to put up. Now, if Van Deusen knew that the metallic silver found by McDermott was a foreign intrusion, he knew that a screening mill would be worthless. We have, in a former part of this opinion, stated that the whole body of this evidence convinced us that while Van Deusen knew that the average silver contents per ton of the ores in sight was nothing like so good as he represented, yet he did entertain the opinion that with a large stamp mill, such as he required the purchaser to put up, and plenty of capital, the ores of the mine might be profit-

ably worked, and, moreover, there was a prospect of discovering higher-grade ores by the further development of the mining claim. The greater part of the nominal consideration for the mine was to be paid in shares of the new company, which shares he was to take. Entertaining these views, he could do nothing which should shake McDermott's confidence in the average silver contents, as indicated by his tests and assays. Yet it was essential to his own future interests that the kind of a mill required by the contract should be put up, and not a screening mill, as desired by McDermott. The role he had to play was a difficult one. It led him to feebly and qualifiedly express doubts as to the existence of native silver "in paying quantities;" it led him to state that his own experience in screening had been unsatisfactory; and yet all this was done and stated in such a way as to assume the character of a mere difference of opinion as to the kind of mill adapted to these ores. He soon learned that McDermott's confidence in the representative character of the samples he had taken was absolute. He also early learned that his confidence in the gross silver contents per ton of the ore in sight, as shown by his assays and milling tests upon these samples, was equally strong. To McDermott it was a clear case that his samples had been "salted," or his results were reliable, and he put it in this way to Van Deusen, stating in a letter to him that nothing could prevent his going on with the purchase of the mine unless, by a new examination, he should be convinced that his samples had been "salted." His confidence in Van Deusen was manifested in an extraordinary manner, for he said in his letter of January 4, 1888, to him, that, if he (Van Deusen) thought the salting possible, he should so telegraph him to visit the mine again. This mark of confidence so strengthened Van Deusen's confidence in the success of his game that he responded by replying, in substance, that he had every confi-

dence in the future success of the mine; that, if he (McDermott) entertained any suspicion that all was not right, he should have no hesitation in giving up the sale; that, if he concluded to go ahead, then to so telegraph Watrous, etc. This letter had the effect anticipated. It confirmed McDermott in his faith, and he did not go to the mine. He did make two efforts to get other samples sent to him, taken from points he indicated in his letter. These samples were not for the purpose of reconsidering the question of the average value of the ore body. That question he treated throughout as settled by his former sampling and the resulting assays. He wished the other samples to settle the question as to the kind of mill. But to do this he wished and directed Van Deusen to send him samples which would be characteristic, and directed the places in the mine from which they should be taken. If he had obtained what he requested, he would have gotten average samples representing the whole body of ore in sight. This would have certainly led to the discovery of the poverty of the ore, and have shown that native silver did not exist in the mine. This result was deliberately defeated, for in each instance he was sent selected ore, running way above the average, as shown by even the "salted" samples. The defendant Van Deusen carefully informed him in each case that the ores were from the points indicated, but were selected ores. The excuse given for sending them was that they were characteristic of the kind of ores which the mill would have to reduce. These samples, of course, showed no native silver, and were calculated to aid Van Deusen in his effort to prevent the putting up of a screening mill, and yet not calculated to shake McDermott's opinion as to the average silver contents of the ores in sight.

When the trade was concluded, December 8, 1888, and part of the price paid, it was upon a private understanding that he (McDermott) was to have further samples for the purpose of determining the kind of mill, and that if, upon

these other samples, he was not satisfied, he might withdraw at any time before March 1st—the date when the last payment was to be made. We have detailed his efforts to get further average samples and the results of those efforts. The interpretation put upon this agreement by both the defendants was such that the right of resampling had been fully permitted by the sending of the samples we have above alluded to. McDermott's efforts to get further ore, he not being entitled to possession until all the purchase money was paid, were absolutely refused by Watrous; Van Deusen explaining that Watrous felt that the private understanding as to the right of withdrawal might be affected if further sampling was permitted. The effect of this conduct was not to arouse suspicion, but to lull McDermott into confidence. This is evident from his telegram of January 7, 1888, to defendant Van Deusen, in which he said:

"Your brother telegraphs cannot ship ore without order of Watrous. This seems unnecessary blocking of progress. Forces me to decide on mill without more tests. Shall simply hurry Watrous' payments and take chances of process. Does Watrous no good."

Subsequently, Watrous relented, and authorized Arthur Van Deusen to send the samples wished. McDermott had written for average samples, saying that the rich samples sent before by Stewart Van Deusen would not enable him to settle the problem as to kind of mill. The result of this was a second lot of very rich selected samples. Whether they came out of the Mudsill mine at all is, on the evidence, somewhat in doubt. Mr. Tobin, the chairman of the complainant company, came over to America in February, following. McDermott applied to have the right of withdrawal renewed so that Tobin, after examining the mine, could accept or reject. He was informed that this was unbusiness-like, and refused. To get possession was necessary to settle the question of kind of mill to be put up. To do this, the last payment, due March 1,

1888, was anticipated, it being made February 15th. Possession was then taken, and a re-examination and resampling made with a view of settling the mill question. These samplings and tests resulted in the discovery that there was no native silver in the mine, and that the average value of the ore in sight was probably so low as to be commercially valueless. Many other details might be given, tending to the conclusion that the conduct of defendant Van Deusen, after he learned of McDermott's discovery, was not that of an innocent man. If he had been free from complicity in this matter, and honest in his opinions and purposes, he would have said to McDermott: "Your tests and assays are all wrong, or your samples were 'salted.'" Knowing, as he did, that there was no native silver in the ores of this mine, he would have realized that McDermott was mistaken, or his samples had been tampered with. One conscious of an honest purpose would have demanded a re-examination and a re-sampling, instead of throwing obstacles in the way.

To sum up our conclusions upon this branch of the case, we have, in support of the hypothesis presupposing Van Deusen's guilty agency in this matter, the following: (1) That the samples were not accidentally "salted." (2) If not by accident, then they were "salted" by design. (3) Van Deusen had a motive prompting a line of conduct which would support his untrue representations. (4) He had the opportunity, and the means were accessible. (5) No other person had a like motive, and no one could profit by the fraud except the defendants. (6) He knowingly misrepresented the average silver contents per ton of the ore in sight, for the purpose of thereby inducing a sale. Though these misrepresentations were, in effect, the expression of an opinion, yet the opinion as expressed was put in form of fact, and was not honestly entertained. (7) There is evidence of former acts of fraud of like character to that now charged, and with reference to the same subject-matter, indicating a systematic scheme of

fraud by which a sale of this property was purposed to be brought about. (8) The conduct of the defendant Van Deusen after the discovery of the fraud was calculated to lull the complainants, and was such as indicated a fraudulent purpose. The whole body of the proof generates a strong conviction that the defendant Van Deusen directly, or through his agents, corrupted the samples relied upon by complainants. We use the word "proof," in the foregoing sentence, in its broad and comprehensive sense, and as embracing in addition to evidence all those grounds upon which may rest a juridical conviction, including facts, circumstances, and presumptions of fact which result from evidence of other facts. Upon the "proofs" adduced, we find sufficient reason for assenting to the hypothesis presented by complainants. While we recognize that, in the absence of direct evidence of the principal fact, there is a possibility that this metallic silver found its way into complainants' samples by accident, or through the intervention of some agency beyond the control of defendants, yet the weight of the proof so decidedly preponderates upon the side of the hypothesis presupposing the guilt of the defendants that it brings about that degree of conviction necessary for judgment in a civil case. The denial of Van Deusen, as a witness, of any complicity in this "salting," cannot shake this conviction. He does not, and cannot, explain how it otherwise happened, and a mere negative fails to shake the evidential force of the proof which points to his guilt.

The defense of accord and satisfaction has been suggested, rather than pressed. After the purchase money had been all paid, and after complainants had taken possession, they resampled the mine with a view to settling the character of the mill which should be put up. The contract required a 20-stamp mill of expensive character. As before shown, McDermott's discovery that from 80 to 90 per cent. of the silver contents was native silver led him to the conclusion that a mill

adapted to the reduction of an ore from which so large a proportion of its silver contents could be taken by screening was the mill needed. We have before shown that Van Deusen, the largest stockholder in the new company, opposed this kind of a mill, and stood upon his contract. His reasons for this attitude we have before considered. So far did he go in his insistence that he privately offered to McDermott personally 2,500 shares of the Mudsill stock if he would give up the idea of a screening mill, and at once carry out the contract. After the assay of the samples taken in February had satisfied McDermott that there was no native silver in the Mudsill ores, and induced a belief that his samples had been "salted," he was confronted with the agreement with Van Deusen, requiring the immediate erection of the mill provided for in the declaration of trust executed December 8, 1887. The belief that a fraud had been practiced had not yet acquired the solid foundation of knowledge. The complicity of the defendants in the "salting" remained to be established by evidence. It was, upon consultation with Mr. Tobin, deemed best to say nothing about their suspicions. Opinion of counsel was taken as to the effect of the agreement with Van Deusen as to erection of mill. They were advised that the contract was imperative. McDermott informed Tobin of Van Deusen's former proposition to give him 2,500 shares if he would go on with the stamp mill. It was deemed very desirable to get the contract so modified as to allow the erection of a smaller mill in the first instance, to be followed by a large one if the results should justify it. It was also agreed that no charge of fraud should be intimated. To accomplish these purposes, Tobin went to see Van Deusen. The result was a modification of the agreement as to the mill, and a concession to the company of the shares offered McDermott. That agreement was, as stated by Van Deusen in a letter to McDermott, in these words:

"Dear Mr. McDermott: Mr. Tobin arrived here this a. m., and I have had a very full talk with him regarding the programme of work at the Mudsill mine and the most judicious expenditure of the capital of the company. Understanding you have stopped the erection of the sizing mill, we have agreed, in substance, as follows: I agree to allow you to, and Mr. Tobin agrees that you shall, at once erect a five-stamp mill; and I therefore authorize you to build such a mill at once, complete with frue vanners and amalgamating pans; and in consideration of this agreement to build such five-stamp mill complete, and agree that the erection of a larger mill may be postponed until the value of the mine has been proved by this five-stamp mill, by crushing at least two thousand tons of at least twenty-ounce ore, though you and the company have the power of building a larger mill at earlier date should you think advisable, and as Mr. Tobin wants to make sure that the company does not run short of capital for further development of the mine, and to assure the company, I have further agreed with him as follows: 'I hereby authorize you to transfer to the company twenty-five hundred of the shares you are to receive from the company on my behalf, as bonus given by me for the benefit of the company; and I further hereby authorize you to transfer to the company seven thousand five hundred of the shares of the company which you are to receive on my behalf, on condition that the company undertake to return to me the seven thousand five hundred shares, or the proceeds thereof, at the par value of the same, at the option of the company, on the payment of the first dividend made by the company, or as soon as the company shall have made a net earning of ten per cent. for one year on its capital stock.'

"Yours truly, S. A. VAN DEUSEN."

This was satisfactory to Tobin and McDermott, and the erection of a five-stamp mill begun. The board of directors of the complainant company, upon being advised of the agreement, repudiated it, and refused to accept the shares thereby offered, fearing its effect in case the facts should develop that the company had been defrauded. The proposed agreement had no element of an accord and satisfaction. It related only to the contract concerning the mill to be put up, and was an agreement inter sese; that is, between the company and one of its shareholders. Its rejection by the company when submitted to it is, however, conclusive.

There remains to be considered the question as to whether the demand for rescission was made in time, and suit prosecuted without laches. When a purchaser acquires knowledge

that he has been defrauded, he has an election of legal remedies. He may keep the property and sue for damages, or repudiate the contract and demand rescission. These remedies are not concurrent, but inconsistent, and the adoption of one of necessity excludes the other. The rule is well settled in equity that after knowledge of the fraud the party must, within reasonable time, make an election as to whether he will affirm the trade, notwithstanding the fraud, or offer to restore the property and demand the return of his purchase money. If, after the knowledge of the facts which entitle him to rescind, he deal with the property as owner, it is evidence of acquiescence and an affirmance of the contract. The authorities to this point are numerous, and the principle well settled. The more important cases are: *Pence* v. *Langdon,* 99 U. S. 578; *Johnston* v. *Mining Co.,* 148 U. S. 370, 13 Sup. Ct. 585; *Oil Co.* v. *Marbury,* 91 U. S. 587; *Upton* v. *Tribilcock,* Id., 54; *Cobb* v. *Hatfield,* 46 N. Y. 533; *Schiffer* v. *Dietz,* 83 N. Y. 308; *Lawrence* v. *Dale,* 3 Johns. Ch. 23; *Tanner* v. *Smith,* 10 Sim. 411; *Gilbert* v. *Hunnewell,* 12 Heisk. 293; *Oakes* v. *Turquand,* L. R. 2 H. L. 325. But, before a purchaser is compelled to elect whether he will affirm or disaffirm, he must be aware of the facts which raise such an election. Delay will not defeat his right to relief, unless the fraud was known to him, or ought to have been known by due diligence. In *Pence* v. *Langdon,* 99 U. S. 581, Mr. Justice Swayne, in discussing a question of alleged acquiescence in a fraud, laid down what we deem the true rule upon this question. He said:

"Acquiescence and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant it has been committed. Current suspicion and rumor are not enough. There must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do. But he may not wilfully shut his eyes to what he might readily and ought to have known. When fully advised, he must decide and act with reasonable dispatch. He cannot rest until the rights of third persons are changed. Under such circum-

stances, he loses the right to rescind, and must seek compensation in damages. But the wrongdoer cannot make extreme vigilance and promptitude conditions of rescission. It does not lie in his mouth to complain of delay, unaccompanied by acts of ownership, and by which he has not been affected. The election to rescind or not to rescind, once made, is final and conclusive. The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant."

The contention of defendants that complainants have waived their right of rescission is based upon the admission of Mr. McDermott, in his evidence, as to the effect upon him of the results of the assays upon the resampling of the mine after complainants took possession, in February, 1888. He says from that time he believed his samples had been "salted." The question as to whether the defendants were responsible for that "salting" was not settled by that discovery alone. His belief in their complicity was not necessarily evidence that he had knowledge of facts which would justify the charge or support a demand for rescission. The witness, in other parts of his evidence, draws a distinction between his belief in the fact of "salting" and his conviction that the evidence connected the defendants with it. When asked the direct question as to when he became fully persuaded in his own mind that the defendants were responsible for the fraud, he says: "It was a gradual growth of conviction, as I collected the evidence. I don't know that I can specify the exact date when I was able to fasten it upon them in my own mind." The fact that misrepresentations had been made as to the average value of the exposed ore body, and that his resampling had shown such results as to make the untruthfulness of these representations probable, was not the discovery of a fact which, by itself, put him to an election. This we have already ruled. Those misrepresentations were in the nature of an opinion. Without evidence that his samples had been tampered with by defendants, he had no knowledge of facts entitling him to rescission. Knowledge of their guilty complicity in the intrusion of metallic silver was and is the knowl-

edge upon which the option of rescission or adoption arose. The knowledge which would have required prompt action was knowledge of facts convincing as to the agency of defendants in imposing on him fraudulent samples. Neither rumors nor suspicion required an election. Either would demand diligence in effort to discover the truth, for, after facts are known calculated to excite suspicion, laches would be imputed if there was negligence in inquiry. That an advantage had been obtained by reason of the unfair character of the October samples was not enough to justify rescission. In defining fraud, Mr. Pomeroy calls attention to the necessity that the undue advantage acquired should be the result of willfulness. He says:

"Every fraud, in its most general and fundamental conception, consists in obtaining an undue advantage by means of some act or omission which is unconscionable; or 'a violation of good faith' is the broad meaning of the term in equity,—the 'bona fide' of the Roman law. Furthermore, it is a necessary part of this conception that the act or omission itself, by which the undue advantage is obtained, should be willful,—in other words should be knowingly and intentionally done by the party. The willfulness of the act or omission is the element which distinguishes fraud from other matters by which undue advantage may be obtained so as to furnish an occasion for the equitable jurisdiction." 2 Pom. Eq. Jur. 353, 354.

It was, therefore, essential that complainants should be aware of the fact that the "salting" had not occurred by accident, or through the intervention of agencies beyond the control of defendants, but by and through their responsible instrumentality. If, after knowledge of this fact, complainants dealt with the property as owners; if, after knowledge, they experimented with the property, that they might see whether to keep it or throw it up—then they have waived their right of rescission, and must rely upon other remedies for relief. That complainants had no purpose to hold onto the property for the purpose of ascertaining whether it would be most profitable to adopt or rescind is made most manifest by their efforts to induce defendants to take it back. (1) On February 27th, immediately after the result of the resam-

pling was known, McDermott wrote Watrous, stating the result of assays, and his great disappointment. He said most of his friends had taken shares upon his original sampling and assays, showing native silver; that they might wish to withdraw—and proposed that he should take 20,000 shares at par, as he had proposed to do only a month before, and let such of his friends withdraw as should desire, in view of the changed aspect of affairs. He wrote Van Deusen to the same effect, and offered to abandon all private arrangements between them. This proposition was declined upon the statement that other investments had been made. On May 10, 1888, he again wrote defendant Watrous, in which, after stating certain facts as to his inability to get a resampling before payment of all the purchase money, his purchase on the results of the October assays, and subsequent discovery that the mine contained no native silver, he concluded by saying:

"I have given you this full statement so that you will understand my sudden change of views about the purchase, and my desire to withdraw from the same before the mine is worked or the mill started. The company has built a complete stamp mill, with concentrators and pans of a capacity of 10 tons daily, which is arranged for quickly doubling its capacity by addition of stamps. This mill will be ready to start early in June. We have practically done nothing in the mine since my last visit. My proposition is as follows: You have written your very favorable opinion of the property, and expressed a willingness to work the mine and build a mill yourself rather than grant a few days extra time for resampling by me, last November. I have done nothing to the mine to change its value, and have nearly completed a very effective mill, such as Mr. Van Deusen knows is adapted to the treatment of the pay ore. I offer now to return the whole property as assigned to me, together with the mill site and Kentucky lode claim, since acquired, and with a completed mill ready to start. With the property I turn over supplies and tools, cars, track, boarding-house outfit, telephone line, etc., on which, in all, over $1,000 has been expended; you to return cash paid you, $110,000. In other words, you get your property back as a going concern, ready to produce, and enhanced in value above what it was when you sold, by the amount of our expenditures, say fully $20,000, and before a stroke of work has been done to in any way change the value of the mine. Should you consider the proposition favorably, I will at once cable London for a meeting of stockholders to be called to decide whether the company will accept terms

I offer. An immediate answer is necessary, because, if you refuse to consider the offer, we must actively push work at the mine to get ore out for the mill, and this present offer is entirely disconnected with any ultimate success or failure in working, but rests simply on the facts surrounding the purchase by me. I have the authority of the board of directors to open this negotiation, subject to shareholders' approval, since property has been deeded to company now, and some shareholders have purchased stock above par considerably. Begging the favor of an early reply, and hoping that you will see the proposition in a favorable light, I remain, yours, truly."

This proposition was absolutely declined by letter of May 16th. We think that these proposals demonstrate that complainants have acted in the utmost good faith, and remained in possession of the property only until they learned facts which would justify a demand for rescission. In *Pence* v. *Langdon, supra,* it was expressly decided that, where the defense of acquiescence or waiver is set up to defeat rescission for a fraud, the burden is upon defendants to make it out. This burden has not been discharged. The suspicions and opinions entertained by complainants were not knowledge of the facts necessary to require election. Facts enough were known to require diligence in inquiry from and after the February assays. The record is full of evidence indicating that in this duty there was no slothfulness. Detectives were employed. A small mill was put up, and mill tests made upon several hundred tons of ore, by which it was clearly shown that the average ores of the mine were commercially worthless. After that date, in the prosecution of inquiry, Wardle was discovered, and his important evidence communicated to complainant's detectives. After that date it was discovered that the small sample of crushed ore sent to Burlingame for assay contained metallic silver, by which it became most probable that the "salting" occurred at Fairplay, and while defendant Van Deusen had access to the bags of samples taken in October. After that date, it was discovered that metallic silver in the form of that placed in the samples was a

purchasable commodity, and to be had in Colorado. The past history of the mine was investigated, and facts enough learned to establish the proposition that Van Deusen knew his representations as to average silver contents of the ore in sight were not true. Other circumstances might be enumerated which came to light after the assays of February, 1888, which, with those mentioned above, served to throw a flood of light upon a transaction otherwise wrapped in mystery, though full of suspicion.

The argument has been urged that complainants ought not to have been misled by the presence of metallic silver; that what was said to them when this discovery was made should have put them on guard; that, if they proceeded with the purchase afterwards, it was at their own peril. Whether most persons would have continued, under the circumstances detailed in this record, to go on to the completion of the trade, is debatable. McDermott, looking back to the occurrences antecedent to the last payment of the purchase money through the light of the subsequent discoveries, pronounces himself a fool for going on with the matter. His judgment is too severe. The precautions he had taken to get average samples, and to guard against their corruption, were sufficient to justify his faith. His assays he knew were trustworthy. He had too high a degree of confidence in the common honesty of defendant Van Deusen, but of this defendants cannot complain. All that was done or said by Van Deusen only tended to lull any suspicion and quiet any doubt. That he (McDermott) placed implicit confidence in the existence of native silver in the average ore of the Mudsill mine was known to defendants. That this confidence was the direct result of the "salting" of his samples was equally well known to them. To say that he ought not to have had such confidence does not come well from one whose intentional fraud brought it into action. It is for the defendants to clearly show that the complainants were not misled by their fraudulent conduct. In the

case of *Reynell* v. *Sprye*, 1 De Gex, M.& G. 548, Cranworth, L. J., in discussing the effect of an untrue representation innocently made, said:

"The case is not at all varied by the circumstance that the untrue representation, or any of the untrue representations, may in the first instance have been the result of innocent error. If, after the error has been discovered, the party who has innocently made these innocent representations suffers the other party to continue in error, and to act on the belief that no mistake has been made, this, from the time of the discovery, becomes, in the contemplation of this court, a fraudulent misrepresentation, even though it was not originally."

This principle applies with greater force where the representation was originally false. If the party making it repent he must fully undo the consequences of his wrong. Vague hints and more doubtful warnings will only aggravate the wrong, and will furnish no protection if the fraud continues to mislead, and was an inducement to action. We find no evidence in this case of any effort to undeceive complainant, but much calculated to throw him off his guard and continue the deception. The conclusion upon the whole case is that the decree of the Circuit Court must be reversed. The prayer for relief as against defendant Watrous must be granted, with interest from date of each payment to him. Defendant Van Deusen must account for the proceeds of all shares sold by him, with interest, and all shares standing yet in his name will be canceled. Defendants will pay the costs of the cause.

RICHARD GIRD ET AL. v. CALIFORNIA OIL CO.

(60 Federal 531. Circuit Court, Southern District of California. February 26, 1894.)

The rules of miners where not in conflict with State or Congressional Acts are as binding as if they were a part of the statute itself.

Variance between notice and record. Where a district rule requires a certain notice to be posted on the claim and to have a copy of such notice recorded a slight variance between the notice posted and the notice recorded is not material.

Distinction between notice and record. A record is not required by the Congressional Act, but if required by state law or district rule must contain a sufficient description, and from the nature of their respective offices the posted notice is not supposed to be as specific as the record or location certificate.

After lapse of time sufficient to have accounted for their loss it may be presumed that monuments required by district rules were of the dimensions required by such rules.

The fact that ground is rough and mountainous does not relieve the locator from the duty of placing such monuments that the claim may be readily traced.

Sufficient posting of notice. A notice of location of a mining claim, required by rules of the district to be posted on the claim, was put in a tin can, which was placed on a shelf in a rock mound on the claim more than two feet high, the corners of the claim being marked by similar mounds: *Held*, that this was a sufficient posting.

Government corners and subdivisions as calls. A notice of location of a mining claim, required by rules of the mining district referred to subdivisions of a United States survey for the boundaries of a claim. It was shown that a surveyor had been deputized to make this survey, and that he returned field notes and a map to the land office, which map was approved by the land department; but that the commissioner, upon information tending to show that the survey was not made in the field, suspended his approval, and ordered an investigation. *Held*, that the notice was sufficient, for the map may be referred to for a description of the claim, whatever may be the ultimate fate of the survey.

[1]**Nominal associates.** Under Rev. St. § 2331, which provides that no placer

---

[1]*Durant* v. *Corbin*, 19 M. R.—.

Courts will not enforce a contract providing for the use of names of nominal locators taking up land in excess of the legal location. *Mitchell* v. *Cline*, 84 Cal. 409; 24 Pac. 164.

location "shall include more than twenty acres for each individual claimant," a claim located by three persons must be limited to said 20 acres when it appears that they are all in the employ, and acting in the interest, of a single company.

[1]**Work done on group. Claims must be contiguous.** Rev. St. § 2324 provides that on all placer mining claims located after a given date and until a patent has been issued, "not less than $100 worth of labor shall be performed or improvements made during each year; but where such claims are held in common, such expenditure may be made upon any one claim." *Held*, that the work required must have been done with a view to prospect or develop the claim; and, in order that work done on one may inure to the benefit of another, held in common with it, the claims must be contiguous.

The peculiarities of oil and gas as flowing minerals considered and the power of one well to drain or destroy another and the effect of water to kill a well considered—with the holding that these incidents were not sufficient to make an exception to the rule that the claims must be contiguous for one to be aided by work done on another.

Action by Richard Gird and J. C. Udall against the California Oil Company to determine conflicting claims to certain mining locations.

MINOR & WOODWARD and EDWARD LYNCH, for plaintiffs.

JOHN D. POPE, for defendant.

Ross, District Judge. The record in this case is a very

[1]*Royston* v. *Miller*, 76 Fed. 50; 18 M. R. 418.

Work on adjoining claim, if for the benefit of the claim to be protected, is valid. *Klopenstine* v. *Hays*, 20 Utah 45; 57 Pac. 712.

Work done on one of a group with diverse ownership. *Eberle* v. *Carmichael*, 8 N. Mex. 169; 42 Pac. 95.

Work done on tunnel held good although it apparently would hit the vein beyond the end lines. *Sherlock* v. *Leighton*, 9 Wyo. 297; 63 Pac. 580.

Work done by tunnel held valid where the party owned an interest in the claims. *Fissure Co.* v. *Old Susan Co.* 22 Utah 438; 21 M. R.—.

Where the annual work is done on a contiguous patented claim the burden of proof is on the party by whom it was done to show that it benefited the possessory claim. *Hall* v. *Kearny*, 17 M. R. 594.

Separate discovery and separate marking of boundaries and record not required on each 20 acres. *McDonald* v. *Montana Co.* 14 Mont. 88; 35 Pac. 668. *Union Oil Co.* 25 L. D. 351.

voluminous one, and has been carefully examined and considered. The premises in controversy are oil-bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims. The defendant, California Oil Company, claiming to be the owner of a placer mining location called the "Razzle Dazzle," made application to the register and receiver of the United States land office at Los Angeles, in which district the land is situated, for a patent, against the issuance of which the plaintiffs, Richard Gird and J. C. Udall, filed a protest in writing, claiming that 17 5-10 acres of the Razzle Dazzle location are embraced by two previous mining locations, called, respectively, the "Whale Oil" and "Intervenor No. 3," of which they are the owners; and thereupon, within the time prescribed by section 2326 of the Revised Statutes, and pursuant to its provisions, the contestants commenced the present action in the Superior Court of Ventura County, of this state, to determine the conflicting claims of the respective parties to the disputed premises, from which court the action was, on motion of the defendants, transferred to this court. The proceedings here are purely statutory, and but a continuation of the contest that arose in the land office (*Wolverton* v. *Nichols,* 119 U. S. 488, 7 Sup. Ct. 289; *Doe* v. *Mining Co.* 43 Fed. 219); and the object of the action being the determination of the question which, if either, of the applicants is entitled to receive the government title to the disputed premises, each of the parties is necessarily an action, and must establish his claim by proof.

The ground in controversy is situate in the county of Ventura, and within the Little Sespe petroleum mining district. That district was not organized until after the passage of the act of Congress of May 10, 1872, which provides, among other things, as follows:

"The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or ter-

ritory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: the location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year. * * * But where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. * * * " Rev. St. § 2324.

Upon the organization of the Little Sespe petroleum mining district, which occurred April 27, 1878, J. C. Udall was elected recorder, and W. Roberts, J. F. Dye, and E. G. Sobey a road committee for the district. On May 4th following, by-laws were adopted, including, among others, the following:

"Section 1. Any one locating a claim or association of claims must show the notice duly posted on the claim, also the corners of the claim, to a witness, who must be a claim owner in the district, who will sign said notice, also a copy of the same to be given the recorder for recording. Sec. 2. No claim shall be recorded until at least three corners are set. When a corner of a claim is designated by a stake, it must be at least three feet high. Mounds of rock for the same purpose shall be two feet high. When a corner cannot be set, a witness post or mound must be set as near to it as possible on the line of the claim, and marked in same fashion as referred to in the location notice. Sec. 3. All claims must be recorded in the district within thirty days from the date of location. * * * Sec. 8. The necessary annual work to be done or expenses made on any claim in this district may, at the option of the claim owner or owners, be done on any road in the district designated by the road committee, the course of which shall be laid out by said committee. Sec. 9. A claim owner shall be entitled to work on any part of such road nearest to his own claim for which he is doing work. Sec. 10. Two members of the road committee at least must locate the course of roads. Their decision shall be final. Sec. 11. The time employed by the road committee laying out course of roads, or in showing claim owners where to work on the road, shall account for work

done on any claim or claims of theirs they may designate to the recorder. * * * Sec. 13. The recorder shall file for record all claims duly certified to, and shall keep the same on file for the period of nineteen days, which shall be considered duly recorded unless set aside by satisfactory proof being shown of a prior location in accordance with these laws. At the expiration of nineteen days, he shall proceed to record the same on the presentation of the proper fee. Sec. 14. The recorder shall issue a certificate for the assessment or necessary annual work done on any claim or association of claims, on being presented, before the end of the year, with a certificate, signed by the president or two members of the road committee, that such work has been done by or for any claim owner on his or their claims, provided said claim is entered on the books of the district; otherwise the claim shall be open to location. Sec. 15. The road on which the annual work for claims is to be done in the district commences at the mouth of the Little Sespe creek; thence by way of the Los Angeles claim, taking the most practical route to Tar creek. * * * Sec. 20. The recorder shall keep a book of record of claims, also a book of record of assessment work, which shall be open at all reasonable times for inspection, and at no time to be taken out of the district."

At the fourth annual meeting of the claim owners of the district, held April 27, 1882, the following resolution was unanimously adopted:

"That all claims situated in this district that have been, or at any time hereafter shall have been, duly represented in accordance with the by-laws of this district for the period of four years from the date of their location, shall not be liable to relocation, or required to pay any further assessment under the laws of the district, subject only to the mineral law of the United States, passed May 10, 1872, and its amendments; this amendment to the laws of the district to take effect thirty days after its publication or posting in the local land office in which this district is situated."

At the sixth annual meeting of the claim owners of the district, held April 28, 1884, it was—

"Voted, that the by-law requiring annual meetings be changed and amended to holding meetings once in four years, dating from the 1st of January next, requiring the next meeting to be held on the 1st day of January, 1889. (2) Voted, that a road overseer be appointed for the district, whose duty shall be to oversee and direct the making and repairing the roads in the district, as laid out and approved by the road committee. (3) Voted that J. C. Udall be the recorder of the district for the above term of four years, and until his successor is duly qualified. (4) Voted, that J. F. Dye, H. Haines, and J. C. Udall be the road committee for the district for the above term of four years. (5) Voted, that J. C. Udall be the

road overseer for the district for the term of four years. * * * (8) Voted, that for the next four years from date all of the claims situated above and between the Los Angeles claim and Squaw flat be held responsible to the overseer for their equal proportion of the expenses of making and maintaining the roads in that part of the district. (9) Voted, that J. C. Udall, the overseer, have power, and is hereby delegated the power, to sell any claim, or sufficient portion thereof, to the highest bidder, for cash, to pay said proportional expenses, the owner of which, after being duly notified by publication or otherwise, refusing to pay his or their proportions or shares of said road expenses."

The rules so adopted by the miners of the district, except where in conflict with some law of the United States or of the state of California, being authorized and sanctioned by express statutory enactment, are, where in force, as valid and binding as if they were a part of the statute itself. It will be seen that by the first local rule respecting the location of claims the locator is required to post a notice on the claim, and to show it, together with the corners of the claim, to a witness, who is required to be a claim owner within the district, who must sign the notice as a witness, a copy of which is required to be given to the recorder for recordation. There is nothing in these requirements in conflict with any of the provisions of the statutes of the United States or of the state of California, but they are subject to the provision of the former that the location must be distinctly marked on the ground, so that its boundaries can be readily traced. The act of Congress does not itself require a mining claim to be recorded (*Jupiter M. Co.* v. *Bodie M. Co.* 7 Sawy. 96, 11 Fed. 666), but the local rules of the district in question declare that all such claims shall be recorded with the recorder of the district within 30 days from the date of location. The local rules do not prescribe what the notice shall contain, but the act of Congress of May 10, 1872, declares that—

"All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument, as will identify the claim."

We see, then, that one of the essentials to a valid location within the Little Sespe petroleum mining district is the posting by the locator of a notice of location on the claim, signed also by a witness who is himself an owner of a claim within the district, and that such notice be recorded with the recorder of the district within 30 days after the making of the location; which record shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim. The Whale Oil claim, which embraces almost all of the ground in controversy between the parties, was located July 15, 1878, by L. D. Gavitt and William Dryden, to whose interest Udall and Gird succeeded prior to the execution of the leases hereinafter mentioned, and the claim duly recorded; and this record constitutes the first ground of objection made by the defendant to the Whale Oil location. As contained in the records of the district, the description of that claim is as follows:

"Com'c'g at a point on Boulder creek, a tributary of the Sespe, at a point where a continuous ledge crosses said Boulder creek, and more particularly where the stream of water crosses the said ledge & has a fall of some 10 feet at a mark ⊄ cut into the ledge; running thence west 16 2-5 chs. to mound of rocks, said last-mentioned line being 10 chains north of oak tree on which is posted notice of Oil Spouter claim [said tree being the S. W. corner of said last-mentioned claim], running thence north 15 chs. to mound of rocks; thence east 26 2-3 chs., crossing Boulder creek at 20 chs. at falls, & marked ⊄ to accessible bluff; thence S. 15 chains to laurel tree, 4 in. in diameter, marked ⊄ thence west 10 chains to point of beg. Cont'g 40 acres of land, situated in the Little Sespe petroleum mining district, Ventura Co., Cal., and known as the Whale Oil Claim. July 15, 1878."

In the record the words in brackets, "said tree being the S. W. corner of said last-mentioned claim," were erased, from which circumstance it is earnestly contended that the notice as recorded could not have been a copy of the notice as posted on the claim, but was written by the recorder Udall "to suit himself." It is said that, if the recorder was copying from a written notice into the book of records, he could not have in-

serted so many words not in the writing from which he was copying. It is not probable that he would; but by no means impossible. The recorder was a man then well advanced in years, and does not appear to be one of much education, and, as he then had no interest in the Whale Oil claim, and did not acquire any for a long time afterwards, it is not possible to discern any motive on his part to make a false or fraudulent record. Moreover, it is not necessary that the record of the claim should be a literal and exact copy of the notice posted on it. The record of a mining claim, when one is required, is intended to contain a more exact and specific description of the claim than the notice posted upon it. This is clearly shown by the circumstance that the statute does not require any notice to be posted or recorded, but leaves the regulation of that matter to the miners of the district, subject, however, to the provisions that, if such record be required, it shall contain—

"The name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

In speaking of the distinction that exists between the notice posted on the claim and the statutory requirement respecting the record of such notice, the Supreme Court of Nevada, in *Gleeson* v. *Mining Co.*, 13 Nev. 465, said:

"There can be no question that the original Paymaster notice was all that the law requires. The only objection to it is that it did not contain in itself a description of the claim by reference to some natural object or permanent monument. It was not necessary that it should. It is only the record of the claim that is required to contain such a description; and there are excellent reasons for making the distinction between the notice and record in this particular. A notice is generally, and for safety ought always to be, posted immediately upon the discovery of the vein, before there is any time to survey the ground, and ascertain the bearings and distances of natural objects or permanent monuments in the neighborhood; and, besides, the claim referred to by the notice is always sufficiently identified by the fact that it is posted on, or in immediate proximity to, the croppings. A notice claiming a location on 'this vein' has only one meaning. But the notice is exposed to the danger of removal by adverse

claimants or destruction by the elements, and for permanent evidence of the location its record is provided for. The record, if it consisted of a mere copy of the notice, would not identify the claim, and there would be an opportunity, as well as a temptation, to the locators, upon the discovery of a more valuable mine in the vicinity, to prove, by perjured witnesses, that their notice was posted on that mine. The floating of claims was by no means an infrequent occurrence prior to the act of 1872, and, if such attempts were seldom successful, they were always vexatious, and often the means of levying a heavy blackmail. It was on this account that the record (not the notice) was required to contain 'such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim.' Rev. St. § 2324. It is a sufficient compliance with this provision of the law if the description of the locus of the claim is appended to the notice when it is recorded."

The purpose of the marking of the boundaries of the claim, hereafter referred to, and of the record of the location, are further stated by the Supreme Court of Colorado, in the case of *Pollard* v. *Shively*, 5 Colo., 317, as follows:

"Marking the boundaries of the surface of the claim as required by statute is one of the first steps towards a location. It serves a double purpose; it operates to determine the right of the claimant as between himself and the general government, and to notify third persons of his rights. Another seeking the benefits of the law, going upon the ground is distinctly notified of the appropriation, and can ascertain its boundaries. He may thus make his own location with certainty, knowing that the boundaries of the other cannot be changed so as to encroach on grounds duly appropriated prior to the change. The prevention of fraud by swinging or floating is one of the purposes served. The record also serves a double purpose. As between the claimant and the government, it preserves a memorial of the lands appropriated after monuments, in their nature perishable, are swept away. It also supplements the surface marking in giving notice to third persons."

It abundantly appears from the testimony that the description of the Whale Oil claim as recorded is sufficient for the identification of the boundaries as claimed by the plaintiffs. Indeed, this is not denied by counsel for defendant.

But it is further contended on the part of the defendant that no monuments were established, either on the Whale Oil or Intervenor No. 3 claim, as required by the rules of the district at the time of their location; that no notice was posted on either of the claims, as required by the rules; that, if the

monuments were erected and notices posted, they were not kept up so as to preserve the validity of the locations, and that no work was done on either of the claims during any year since they were located. The Whale Oil, as has been said, was located July 15, 1878, by L. D. Gavitt and William Dryden. J. F. Dye was then living on the Kentuck claim, of which he was the claimant. During the preceding May, a claim called the "Oil Spouter" had been located by A. W. Potts and Alfred James, the notice of location of which was posted on an oak tree situated in Boulder cañon above its junction with Sespe creek. Dye suggested to Gavitt and Dryden, who were visiting him, that they locate the ground claimed as the "Whale Oil," and they concluded to do so. Early in the morning of the day the location was made, Gavitt prepared a rope to correspond with a chain, with which to measure the distances, and Dye pointed out to him the oak tree on which the Oil Spouter notice was posted. From that tree Gavitt, assisted by the recorder, Udall, measured up Boulder cañon 10 chains, which was the width of the Oil Spouter claim. At this point, which was on the northerly line of the Oil Spouter, there was a ledge of rocks and a waterfall of 8 or 10 feet, and this ledge was selected as the starting point of the Whale Oil claim. The ground there, and, indeed, the entire territory included within the district in question, is extremely rough and mountainous; so much so that Gavitt had great difficulty in establishing the corners of the Whale Oil claim, one of which it was necessary to fix by means of a witness stake. The witness Udall, by reason of his age and the roughnes of the ground, was unable to go with Gavitt along the lines of the claim, but he saw Gavitt traversing them and erecting the monuments, who pointed them out to the witness, including the witness stake to mark the northeast corner, which could not be reached by Gavitt because the ground at that place is almost perpendicular. Gavitt worked several hours in thus marking the boundaries of the Whale

Oil claim, and the notice posted by him on it was so exact and specific that the surveyors who were witnesses for the defendant on the trial of this case had no difficulty in finding the lines of the claim from the description given in the notice. At at least two of the corners of the claim they found a pile of rocks still existing, though they were not then two feet high, as required by the local rules. Nor is there any direct evidence that any of the monuments were ever of the exact height prescribed by the rules of the district. But Gavitt, the man who erected them, was dead when the evidence was taken, and Udall, the only other witness to the building of the monuments, was unable to see, from the position he occupied, the height of them. Photographs introduced in evidence show that the locus in question is but a mass of boulders and rocks, broken and otherwise. Apparently they were the only things out of which the monuments could have been built, and as Gavitt was seen by Udall at work building them, and as he was engaged in making the location long enough to have built the monuments the required height, and as after the storms of 14 years, which the evidence shows to be heavy in those mountains, some of them still stand at a height of seven or eight inches I think the court is justified in finding that, as originally constructed, they answered the requirements of the local rules.

The evidence in respect to the location of the Intervenor No. 3 claim, which covers a small strip of the disputed ground, is very different. That claim adjoins the Whale Oil on the east, and is claimed to have been located March 6, 1885, by the plaintiff Udall. The notice of location, as recorded in the records of the district, is as follows:

"Intervenor No. 3.—Lo

"Notice is hereby given that I the undersigned have this day located & claim 20 acres of this oil land for an oil claim to wit commencing at the northeast corner of the Oil Spouter claim running thence north 15 chs. to the northeast corner of Whale Oil claim thence east 20 chs. thence south

15 chs. to the northeast corner of the Intervenor claim thence west on the north line of the Intervenor claim 20 chs. to place of beginning, contang 20 acres to be known as the Intervenor No. 3 J. C. Udall.

"Little Sespe P M District Mar 6th 1885 at 10 a. m.

"Recorded Mar 12th 1885 J. C. Udall,
"Recorder.

"Witness Mason Bradfield."

Although the notice purports to have been witnessed by Mason Bradfield, Udall himself in his testimony admits that Bradfield did not in fact witness the posting of the notice on the claim, nor did he (Udall) ever point out to him its boundaries, nor was Bradfield a claim owner within the district, but that he (Udall) signed Bradfield's name to the notice, and entered it in the record a long time after the pretended location. In none of these particulars did the locator conform to the requirements of the local rules. Besides, not only does the testimony of the very man who claims to have made the location fail to show the proper marking of the boundaries of the claim on the ground, but it is perfectly apparent therefrom that they were not so marked as that the boundaries of the location could be readily traced. The circumstance that the ground was extremely rough and mountainous did not relieve the locator of the obligations imposed upon him by the law. It is plain that the pretended location of the Intervenor No. 3 claim was invalid from its inception, and it need not, therefore, be further considered. The notice posted upon the Whale Oil claim remained so posted some months. Udall testifies that he saw it on the tree several months after it was put up, but never saw it afterwards, and there is no other evidence that it was ever afterwards seen. It was probably destroyed by the elements. Nor is there any evidence that any of the monuments of the Whale Oil claim were kept up or rebuilt. It is not contended by the defendant that a location, valid when made, is lost by the temporary destruction of a notice or of monuments, especially where such destruction occurs without the fault of the owner; but it is contended

that, as one of the purposes of the requirement that the locator shall so mark out his claim as that its boundaries may be readily traced is for the guidance and protection of other miners, a location thus valid cannot be maintained for a long series of years, without actual possession, unless the boundaries are kept so marked as that they can be readily traced. This question need not be decided, because of the view I take respecting the annual expenditures required by law to be made upon all claims prior to the issuance of a patent therefor. As has been seen, the requirement of the statute is "that on each claim located after the tenth of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year," provided that, "where such claims are held in common, such expenditure may be made upon any one claim." The statute further provides, as appears from the citation already made, that—

"Upon a failure to comply with its provisions, the claim or mine upon which such failure occurred shall be open to re-location in the same manner as if no location of the same had ever been made, provided, that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location."

From time to time after the organization of the Little Sespe petroleum mining district, a large number of claims were located within its limits. In 1878 a well was commenced on the Kentuck claim, and sunk until oil was reached. Shortly afterwards, two wells were sunk on the Los Angeles claim, at a cost of about $60,000. In those days the difficulties of operating in the district were great, and the value of the territory had not been demonstrated. The result was that the locators began to move away, and by 1882 no one remained there as a permanent resident but the recorder, Udall. He remained and, personally and by employees, did more or less work on the roads, and sought to interest capitalists in the

territory. By degrees he acquired a large number of claims in the district, in which, through him, the plaintiff Gird subsequently acquired an interest; and those two persons—Udall and Gird—thereafter, by written instrument under date January 19, 1886, and in which L. D. Gavitt, Edward Roberts, and E. G. Sobey joined as lessors, leased, upon certain terms and conditions not here necessary to be stated, for the period of 99 years, to Lyman Stewart, Dan McFarland, and W. L. Hardison, 60 mining locations within the district in question. This lease with the consent of the lessors, was subsequently assigned to the Sespe Oil Company, a corporation, to which corporation Udall and Gird, by a subsequent lease, of date May 14, 1887, leased, for a similar period of 99 years, and upon similar terms and conditions, 20 other mining claims in the Little Sespe petroleum mining district. The 80 mining locations so leased embrace in the aggregate between 8,000 and 9,000 acres of land, and are widely scattered over the territory, which is many miles in extent, and through which run many mountain ranges and precipitous cañons. Shortly afterwards, the defendant, California Oil Company, succeeded to all of the lessees' rights under these leases. Among the claims so leased were the Whale Oil and Intervenor No. 3. These 80 locations, the plaintiffs contend, constitute a consolidated claim, the working of which could be best done by one agency and pursuant to one general system, the expenditures in pursuance of which could be legally and properly proportionately applied to the respective claims included within the so-called consolidated claim. If this can be legally done, it is quite manifest that 80 locations, embracing more than 8,000 acres of land, would not necessarily constitute the limit, but that the system may as well embrace every claim within the district, and thus an entire district be acquired by one agency pursuing a general system of development of the whole, and making annual expenditures equal in amount to the aggregate required by law to be made or performed upon

the separate and independent locations. It is endeavored to sustain this position upon the theory that, as it is the policy of the law to encourage the greatest and most economical development of the mineral lands, it encourages such consolidation of ownership and operation of claims "where all of the mineral can be extracted from a large body of land more economically under one ownership, one system of management, one combined operation, than by the diverse and antagonistic operations of many claims." And a great deal of testimony and other evidence was introduced to show that the nature of petroleum and the geological structure of the country comprising the Little Sespe petroleum mining district, and the effective drainage power of an oil well, are such that all of the locations can not only be best worked by one system, but that it is almost necessary that they should be so worked.

It is undoubtedly true that petroleum, with its natural gas, unlike other mineral deposits, is movable by virtue of its own inherent force, as well as by virtue of its liquid character, and that this gas may be, and is, greatly assisted by pumps. The evidence shows, too, that, if fresh water gains access to the oil rock, it will drive out of the rock all of the gas and oil, and will do this for great distances. The evidence of Mr. Minor and of other witnesses shows that many fine wells in Pennsylvania have been ruined from this cause by neglect or design. Their evidence also shows that there it was common for unscrupulous persons to bore wells on the margin of their own holdings for the very purpose of thereby drawing oil from their neighbor's premises. But, as the normal condition of petroleum is one of repose, and not of motion, and it belongs to the rock in which it is embedded, it would seem to be very clear that the only difficulty in the way of preventing the recovery by the owner of the oil so abstracted would be the difficulty of making the necessary proof. But the fact that an oil well will drain oil from adjacent ground for very considerable distances, and the further fact that there is always danger of

fresh water getting into the well and destroying the producing capacity, not only of that particular well, but also of neighboring ones, are strongly relied upon to sustain the contention that the 80 locations claimed by the plaintiffs may, and ought to be, considered as one consolidated claim. In support of the same contention much evidence was also given tending to show that the stratification of the district in question is so irregular that to work it judiciously and profitably it is necessary to develop the territory by successive wells, or, as expressed by some of the witnesses, "to feel one's way along." And it was also shown that, by machinery adapted to the purpose, a great number of pumps, operating as many wells, can be worked with one engine and steam plant, situated at a central point, and, by means of pumps and pipe lines connecting with the wells, the crude oil can be transported for long distances to reservoirs and to the refinery; and that one superintendent can as readily care for many miles of territory as for one claim, and that one man can operate an engine and boiler that will pump several wells, and that, by the use of a telephone line and telephones properly placed, the superintendent and foreman can direct the operation of their men, and care for the operation of a plant covering many miles of territory. And such, the proof shows, was the plan of operations adopted by the lessees of the plaintiffs, in the pursuance of which they have expended annually more than $8,000, and in the aggregate more than $300,000. All of this, no doubt, greatly conduces to the profits of the plaintiff's lessees, and is very convenient. But I am unable to see that these facts at all answer the requirements of the law regarding the location and acquisition of placer mining ground, which is the same whether the mineral it contains be gold, silver, quicksilver, petroleum, or anything else, or the applicant for the government title be rich and able to conduct operations on a large scale, or poor and able only to make the annual expenditure of $100 in work or improvements. That expenditure, up

to the time of the issuance of the government patent, is essential, subject to the provision contained in the statute that, where the "claims are held in common, such an expenditure may be made upon any one claim." In speaking of this statute, the Supreme Court, in *Chambers* v. *Harrington,* 111 U. S. 350; 4 Sup. Ct. 428, after referring to the local mining rules requiring annual work to be done in order to hold a claim, said:

"Congress, when it came to regulate these matters, and provide for granting a title to claimants, adopted the prevalent rule as to claims asserted prior to the statute; and, as to those made afterwards, it required $100 worth of labor or improvement to be made in each year on every claim. Clearly, the purpose was the same as in the matter of similar regulations by the miners, namely, to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting on the principle of the dog in the manger. When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But, obviously, on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them. The principle is well stated by Judge Sawyer in the case of *Mining Co.* v. *Callison,* 5 Sawy. 439; Fed. Cas. No. 9886. 'Work done,' he says, 'outside of the claim, or outside of any claim, if done for the purpose and as a means of prospecting or developing the claim, as in the cases of tunnels, drifts, &c., is as available for holding the claim as if done within the boundaries of the claim itself. One general system may be formed, well adapted and intended to work several contiguous claims or lodes; and, where such is the case, work in furtherance of the system is work on the claims intended to be developed.'"

In the case at bar, none of the work done or expenditures made by the lessees of the plaintiffs, relied on to sustain the claim of the Whale Oil, were done or made on any claim contiguous to it. It is true that the evidence shows that, prior to the making of the leases in 1886 and 1887, Udall from time to time, under and pursuant to the local rules of the district, did considerable work in building roads in the district, and on the road that led in the direction of the Whale Oil claim. But the local rules, in so far as they conflict with the act of Con-

gress are, of course, of no avail, and that, as has been repeatedly stated, requires an annual expenditure of $100 in work or improvements on each claim, provided that, where the claims are held in common, such expenditure may be made upon any one claim. But, to come within this latter provision, the claims so held in common must, as said by the Supreme Court in *Chambers* v. *Harrington, supra,* be contiguous, and the labor and improvements relied on must, as held in *Smelting Co.* v. *Kemp,* 104 U. S., at page 655, be made for the development of the claim to which it is sought to apply them; that is, in the language of the Supreme Court, "to facilitate the extraction of the minerals it may contain." This, I think, cannot be justly affirmed of any part of the large expenditures shown to have been made by the lessees of the plaintiffs in the development of some of the claims embraced by the leases, all of which are remote from, and none contiguous to, the Whale Oil. I have not overlooked the contention of plaintiffs' counsel that by the well the lessees of the plaintiffs commenced on the Kenyon claim they hoped and expected, in years to come, to draw the oil from the Whale Oil claim, which is distant from the Kenyon considerably more than a mile, and between which and the Kenyon is a mountain range. The time when this result might be reached was fixed by the plaintiffs' witness who advanced the theory at from 10 to 100 years. When to this is added the fact that the well that was thus expected to extract the oil from the Whale Oil claim was not commenced until 1891, which was after the location of the Razzle Dazzle claim, upon which the defendant relies, nothing more need be said to show that work upon the well upon the Kenyon claim cannot be counted to maintain the validity of the Whale Oil location.

It is further contended on the part of the plaintiffs that the failure to do the required annual work or make the required annual improvements on the Whale Oil claim was due to threats made by Dye to Udall, and by Bradfield to employes

of the plaintiffs' lessees. The record does not sustain the contention. It seems that about 1886 Dye killed a man named Haines, and in 1888 he grossly insulted Udall, and threatened his life. The trouble between them grew out of some matter connected with the prosecution of Dye for the killing of Haines. All of this was long after the making of the leases by Udall and Gird, which conferred on the lessees all the rights of the lessors in and to the leased premises for the period of 99 years, and by the terms of which leases the lessors were required to make the annual expenditures required to hold and perfect the respective claims embraced by them. Dye's threats against Udall had no application to the lessees of the plaintiffs. In respect to the alleged threats of Bradfield, the testimony shows that none were made by him, and that what was said by him to the employes of the plaintiffs' lessees had relation only to the Oil Spouter claim. For the reasons stated, I am of the opinion that the failure to do the required annual work or make the required annual improvements upon the Whale Oil claim is fatal to that location, and that the ground thereby covered became subject to relocation.

It remains to consider the Razzle Dazzle location which was made December 6, 1890, and under and in pursuance of which the defendant asserts the right to a patent from the government. Mason Bradfield, George J. Henley, and John Thompson were the locators of this claim. It was witnessed by J. G. Barker. The location notice is as follows:

"Notice of Location of a Placer Claim.

"Notice is hereby given, to all whom it may concern, that Mason Bradfield, George J. Henley and John Thompson citizens of the United States of America, over the age of twenty-one years, have this day located, under the Revised Statutes of the United States of America, chapter six, title thirty-two, the following described placer mining ground, viz. It being the north half of the N. E. quarter of the N. E. fractional quarter, and lot one of Sect. one, T. 4. N. range (20) twenty west S. B. M. and more fully described as follows, beginning in the center of lot (6) six S. (1) one T. (4) four N. (20) R. twenty west S. B. M. at a monument of Stone's, running north twenty-four (24) and 40-100 chains, to a monument of stones, thence east

twenty (20) chains to a monument of stones, thence south twenty-four (24) and 40-100 chains to a monument of stones, thence west twenty (20) chains to a monument of stones which is the place of beginning this claim contains forty-eight (48) and 90-100 acres of Pet. Oil & Brown Stone Mining ground situated in what is called the Little Sespe P. O. mining district, county of Ventura state of California.

"This claim shall be known as the Razzle Dazzle Placer Mining Claim, and we intend to work the same in accordance with the Laws of the United States of America.

"Dated on the ground this 6th day of December, A. D. 1890.

"Locators
Mason Bradfield
Geo. J. Henley
John Thompson"

"Attest
"J. G. Barker
"J. G. Barker

The notice was placed in a small tin can, and the can placed by the locators on a little shelf in a rock mound, more than two feet high, erected by them near a tree on the claim, and a copy of it filed for record with the recorder of the district, December 24, 1890. The evidence shows that the corners of the claim were marked by large rock mounds, considerably more than two feet in height and near the northeast corner a diagram was cut in the rock, and measurements given by which the claim could be easily identified. The evidence, I think clearly shows that the boundaries of the claim were so marked upon the ground as that they could be readily traced. It is said for the plaintiffs that this location did not comply with the local rules requiring the notice of location to be posted on the claim; that putting it in the tin can, and the can in the pile of rocks, was hiding, and not posting it. I do not think so. As has been already said, one of the main purposes of the rule requiring the posting of the notice on the claim is for the guidance and protection of other miners seeking to locate claims. And it cannot be doubted that a miner traversing a mining region in search of mining ground who should see such a mound of rocks as usually marks a mining claim, with a tin can carefully placed in it, and who was seeking in good faith to inform himself, would fail to examine the contents of the can. The very fact that such a can was put in such

a place would indicate to the miner that it was put there for a purpose, and that purpose the protection of a notice of information from destruction by the rains or from other causes. The objection made, in my opinion, is without merit.

It is further urged that the notice itself did not convey any information as to the boundaries of the claim, and this because it refers to certain subdivisions of a United States survey, which, it is said, was never in fact made upon the ground. A portion of the township in which the ground in controversy is located was surveyed prior to the location of the Whale Oil claim, and thereafter one Collins was deputized to survey the remainder of the township. This survey Collins claimed to have made, and he returned to the land office field notes thereof and a map, which received the approval of the land department. Upon information tending to show that the pretended survey by Collins was not in fact made in the field, the commissioner of the general land office subsequently, to wit, July 15, 1885, suspended all entries of land embraced within it pending an investigation of the matter. But, afterwards, filings and entries were permitted and patents issued by the officers of the land department, based upon that survey. I agree with counsel for defendant, however, that it is immaterial in this proceeding what may be the ultimate fate of the Collins survey. If it should continue approved and valid, the Razzle Dazzle location conformed to it as required by the provisions of section 2331 of the Revised Statutes; and, if it should be set aside, the map of record in the land office may still be as well referred to for a description of the ground located.

It is further urged on the part of the plaintiffs that, independent of the Whale Oil location, the ground covered by the Razzle Dazzle location was not at the time open to location by Bradfield, Henley, and Thompson, because it was then in the actual physical possession of David H. Irland, who was then, by his employes, engaged in putting down a well upon

it, and that Bradfield and Henley were estopped from claiming the ground; the latter for the reason, it is said, that he was in the employ of Irland, and the former upon the ground that Irland was holding under him. But these positions are without support in the record. The evidence, I think, shows that Irland himself was in the employ of the defendant oil company, and that the work that he was doing on the ground in question at the time of its location was the defendant's work, and that the location made by Bradfield, Henley and Thompson was in reality made for the defendant company, which, through mesne conveyances made almost immediately afterwards, acquired all of the rights therein of Bradfield, Henley and Thompson. Irland never held under Bradfield any interest in the ground covered by the Razzle Dazzle location. He did hold a lease of the Oil Spouter claim from Dye and a man named Beattie, who had previously succeeded to Bradfield's interest therein. And in respect to the Oil Spouter No. 2 claim, which, it is said for the plaintiffs, covered a part of the disputed premises, and of which it is said Henley was one of the locators, it is enough to say that that pretended location was invalid because the notice of location was neither recorded nor witnessed as required by the local rules. It appears, however, from the notice of location that the Razzle Dazzle claim contains 48.90 acres of land. It is declared by the act of May 10, 1872, c. 152 (17 Stat. 91), and the provision was afterwards carried into the Revised Statutes, that no placer location "shall include more than twenty acres for each individual claimant." Sec. 2331, Rev. St. If Irland was in the actual possession, and working the ground for himself, and Bradfield, Henley and Thompson were acting for themselves in making the location of the Razzle Dazzle on December 6, 1890, the location so made by them would be void, because, in that event, the location would have been made upon ground, not vacant and open to location, but upon ground in the actual and adverse occupancy of another. But, as al-

ready observed, I think the evidence shows that Irland, Bradfield, Henley and Thompson were, in truth, all acting for the defendant company at the time of the location of the Razzle Dazzle claim, and therefore that the location should be considered and treated, not as made by the three individuals, Bradfield, Henley and Thompson, but as made for and in the interest of the defendant company, and must, under the provision cited, be limited in amount to 20 acres of land. That defendant has expended upon the ground in question, annually since its location, much more than the amount required by the statute, and much more than the $500 required by statute to entitle the applicant to apply for and obtain a patent, clearly appears from the evidence. For the reasons given, I am of the opinion that the right of possession of the disputed ground, to the extent of 20 acres, is in the defendant, and that the plaintiffs have no right thereto. *There will be judgment in accordance with these views, with costs to the defendant.*

LOUIS T. QUIGLEY ET AL. v. CHARLES E. GILLETT ET AL.

(101 California 462; 35 Pac. 1040. Supreme Court. March 1, 1894.)

[1]**Court will not inquire into the land office proceedings.** In a suit supporting an adverse claim the court has nothing to do with the proceedings in the land office or to pass upon their sufficiency.

The proof of the prior location of the ground by third parties as a reservoir site is immaterial to the issue.

[2]**The burden of proof to show annual labor not performed is** upon the party claiming forfeiture. Where the court found that no competent evidence was produced to show such work it will be assumed that they put the burden of proof on the wrong party and the finding will not be sustained.

Appeal from a judgment of the Superior Court of Plumas County.

The facts are stated in the opinion of the Court.

GOODWIN & GOODWIN and C. N. HARRIS, for appellants.

C. E. MCLAUGHLIN and P. O. HUNDLEY, for respondents.

THE COURT: This action was brought to determine the adverse claims of the parties to the right of possession of certain placer mining land in the County of Plumas.

The complaint alleged in substance that on the twenty-first

[1]*Hoffman* v. *Beecher*, 17 M. R. 503. In suit supporting, neither party is required to make out complete case for patent. *Doe* v. *Waterloo Co.* 18 M. R. 265.

[2]*Providence Co.* v. *Burke*, (Ariz.) 57 Pac. 641; 19 M. R.—. *Harris* v. *Kellogg*, 117 Cal. 484; 49 Pac. 708. *Axiom Co.* v. *White*, 10 So. Dak. 198; 72 N. W. 462. *Dibble* v. *Castle Co.* 9 So. Dak. 618; 70 N. W. 1055.

Ordinary complaint in ejectment will support adverse claim and it may be amended after the 30 days. *Deeney* v. *Mineral Co.*, (N. Mex.) 67 Pac. 724.

Suit may be dismissed for want of prosecution without verdict for either side. *Carnahan* v. *Connolly*, 16 Colo. App.—; 68 Pac. 836.

day of March, 1891, the land in controversy "was, ever since has been, and now is, gold bearing public mineral land of the United States," and that on the day named four of the plaintiffs and three other persons, the grantors of one of the plaintiffs, all of whom were then citizens of the United States, entered upon, took possession of, and located the same as a placer mining claim, which they designated and called the Fortuna placer mining claim, and that they and their successors in interest have ever since remained and are entitled to remain in the possession thereof; that on the fourth day of November, 1891, the defendants filed in the proper United States land office their application for a patent for the Diana placer mine, and included within their application the whole of the land and premises located as aforesaid by the plaintiffs and their grantors, and that defendants claim the whole of the said land adversely to the plaintiffs and to be entitled to the exclusive possession thereof; that the register of the land office duly posted and published a notice of the said application, and that on January 2, 1892, within the time allowed by law and the said notice, plaintiffs filed with the said register their adverse claims, for the said lands, and their protest against the issuance of a patent to the defendants, or either of them, for the same; that the claim of defendants is without right, and that they are not, nor is either of them, entitled to the possession of the said land, or any part thereof, adversely to the plaintiffs.

The answer denied among other things, that on the 21st of March, 1891, the lands described in the complaint, or any part thereof, were, or ever since have been, or now are, gold bearing public mineral lands of the United States, and alleged that long prior to the time stated the assignors of the defendant, Charles E. Gillett, entered upon the said lands, which were at that time free and open to exploration and purchase by citizens of the United States and those who had declared their intention to become such, and under regulations pre-

scribed by law, and according to the local custom of miners, proceeded to and did locate the same as a mining claim and at the time of such location were citizens of the United States; that afterwards they entered into the possession and occupation of the said lands and every part thereof, and remained in such possession and occupation in accordance with the laws of the United States governing the holding of mining claims, until they conveyed the same to this defendant, since which time he has occupied and held the same in conformity with such laws; denied that on the second day of January, 1892, or at any other time, plaintiffs filed with the register of the land office any sufficient adverse claim for the premises in controversy, or protest against the issuance of a patent therefor to the defendant, and alleged that neither the plaintiff nor either, or any of them, have, or ever had, any right, title, interest or estate in and to the said premises.

The case was tried by the court, without a jury, and the findings were that on the twenty-first day of March, 1891, the lands described in the complaint were gold-bearing public mineral lands of the United States, and were located by the plaintiffs and their grantors, in every respect required by law and the local customs, rules and regulations of miners, as a placer mining claim, under the name of the Fortuna placer claim, that on the day named the locators were citizens of the United States, and ever since have been, and now are, the owners of, in the possession of, and entitled to the possession of, the said lands, and every part thereof; that on the seventh day of August, 1889, the grantors of the defendant, Charles E. Gillett, entered upon and located, in all respects as required by law and the local customs, rules, and regulations of miners, the lands and premises described in their complaint, under the name of the Diana placer mining claim, and each of them was then a citizen of the United States; that during the year 1890 neither the defendants nor their predecessors in interest did or performed, or caused to be performed, any work or labor

upon said Diana placer claim, in the development thereof, or otherwise, or at all.

Judgment was accordingly entered that the plaintiffs were the owners of, and in the possession and entitled to the possession of, all the lands and premises described as the Fortuna placer mining claim, and that the defendants were not entitled to the exclusive or any possession of said lands adversely to plaintiffs.

From this judgment the defendants have appealed, and the case is brought here for review on a bill of exceptions, which contains specifications to the effect that each of the findings above referred to, except that as to the location made August 7, 1889, was not justified by the evidence.

1. The protest filed by plaintiffs in the land office was headed "In the matter of the application of Thomas B. Ludlum, as the attorney in fact of Charles E. Gillett, for a United States patent for the 'Diana placer mine,' or mining claim, and the land and premises appertaining to said mine, situated in an unorganized mining district in Plumas County, State of California," and it is claimed by appellants that the paper did not constitute a sufficient protest, and therefore the court erred in admitting it in evidence over their objection. We see no prejudicial error in the ruling complained of. The action was brought "to determine the question of the right of possession" of certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the land office, and no power to determine as to their regularity or irregularity, sufficiency, or insufficiency.

2. The defendants offered to prove that the lands in controversy were located as a reservoir site in May, 1881, by a corporation, but did not offer to show that any of the parties to this action, or their grantors, were connected with or interested in the said reservoir site or the said corporation. The offered evidence was objected to by the plaintiffs as irrelevant and immaterial, and was properly excluded by the court.

The reservoir claimants, if any there were, were not before the court, and it had no power to determine as to their rights.

3. The statute provides that: "On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year * * * and upon a failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives have not resumed work upon the claim after failure and before such location;" and "provided that the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim." (U. S. Rev. Stat., Sec. 2324, as amended January 22, 1880.)

The bill of exceptions states that: "No competent evidence was offered by the defendants, showing, or tending to show, that any assessment work required by the act of Congress or the local laws of the mining district, or that any work of any character for developing the 'Diana placer mining claim,' had been done or performed on the said claim by the defendants or any one else for them between the seventh day of August, 1889, the time of its location, and the eighth day of September, 1891, or at any time prior to the location of the 'Fortuna placer mining claim,' or that the defendants had resumed work prior to the eighth day of September, 1891."

The record is silent as to whether any evidence was offered by the plaintiffs showing that no work was done on the claim between the dates above named, and, in view of the specifications, it must be presumed that none was offered, the presumption on appeal being that the statement or bill of exceptions contains all pertinent evidence upon points specified, although the record does not show affirmatively that such is

the case. It must be assumed, therefore, that the findings of the court that no work was done by the defendants or their predecessors in interest during the year 1890, and that the said lands were public mineral lands of the United States in March, 1891, were based upon the theory that the burden was on defendants to show that sufficient work was done to meet the requirements of the statute, and that in the absence of such showing the findings must be against them.

The question then arises, was this theory correct, and were the findings referred to justified? The evidence shows, and the court found, that the location of August 7, 1889, was a valid location made in all respects as required by law. This being so, the ground located became the property of the locators, and could not be relocated until they lost, abandoned, or forfeited their rights to it. As said in *Belk* v. *Meagher,* 104 U. S. 284, 285: "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. * * * The language of the act is that the locators 'shall have exclusive right of possession and enjoyment of all the surface included within the lines of their locations,' which is to continue until there shall be a failure to do the requisite amount of work within the prescribed time. * * * The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

The question as to which side has the burden of proof in a case like this, where it is claimed that a prior valid location has been lost or forfeited by a failure to do the necessary work, arose directly and was passed upon in *Hammer* v. *Garfield M.*

Co. 130 U. S. 292. That was a suit to quiet the plaintiffs' title to a lode mining claim in Montana. The complaint alleged that the plaintiff was a corporation duly organized, etc., that it was the owner of a certain quartz lode, known as the Garfield lode or mining claim, and that it and its predecessors in interest had been in the possession of, and entitled to, the lode ever since its discovery and location; that notwithstanding its right to the possession, the defendant, Hammer, on or about the first of January, 1883, assumed to enter upon the premises and relocate the same, and that he pretended to claim an interest or estate therein adversely to the plaintiff, and had made application to the local United States land office for a patent therefor, and that the plaintiff had duly filed in that office its adverse claim to the premises.

The answer of Hammer denied that the plaintiff was the owner of the lode described, or of any part thereof, or that it was then, or had been for a long time, in possession thereof. And it set up that on the first day of January, 1893, one Wolf entered upon the premises described, the same being then vacant mineral land of the United States, and discovered thereon a vein or lode of quartz bearing silver and other precious metals, which he located in accordance with the requirements of the law; that afterwards the defendant became the purchaser of the premises from Wolf, and had ever since been the owner and entitled to the possession thereof; and that whatever claim the plaintiff ever had to them became forfeited before the 1st of January, 1883, since which time he had not had any estate, title, or interest therein or possession thereof.

The court, Mr. Justice Field delivering the opinion, said: "The answer does not distinctly put in issue the validity of the original location; it confines its traverse to the existing right and ownership of the plaintiff in the whole of the mining claim, to its long possession of the premises, and to the possession of the plaintiff and its predecessors since the discovery

and location of the mining claim, and then sets up the alleged forfeiture of the claim by the plaintiff and the defendant's relocation of it. * * * As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work as required by law, each year, was not done on the claim in 1882, * * * A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law."

That decision is decisive of the question in hand and must be followed since the court rendering it has jurisdiction to review all cases like this, when the amount in controversy is sufficient. (*Chambers* v. *Harrington*, 111 U. S. 350.)

It follows that the theory on which the court below acted was not correct, and the findings complained of were not justified by the evidence.

The judgment must therefore be reversed, and the cause remanded.

So ordered.

[1]SILAS F. KING v. AMY AND SILVERSMITH CONSOLIDATED MINING COMPANY.

(152 U. S. 222. Supreme Court. March 5, 1894.)

[2]Where a vein crosses both side lines of its survey it cannot be followed on the dip beyond the side lines.

Side and end lines. The side lines of the location of a lode claim, under Rev. Stat. Sec. 2322, are those which run on each side of the vein or lode, distant not more than 300 feet from the middle of such vein. A line in such a location which does not run parallel with the course of the vein, but crosses it, is an end line.

When side, become end lines. When, in making such a location, the claimant calls the longer lines, which cross the vein, side lines, and the shorter lines, which do not cross it, end lines, this court will disregard, in its decision, the mistake of the locator in the designation of the side and end lines, and will hold the locator to the lines properly designated by him, as it cannot relocate them for him.

Appeal from and in error to the Supreme Court of the State of Montana.

[1]Case below 16 M. R. 38.

[2]*Watervale Co.* v. *Leach*, 17 M. R. 568. *Flagstaff Case*, 9 M. R. 607. *Cosmopolitan Co.* v. *Foote*, 101 Fed. 518.

Vein leaving one end line and one side line has extralateral rights. *Fitzgerald* v. *Clarke*, 17 Mont. 100; 42 Pac. 273. *Tyler Co.* v. *Last Chance Co.* 71 Fed. 848. *Cons. Wyoming Co.* v. *Champion Co.* 63 Fed. 540; 18 M. R. 113. *Tyler Co.* v. *Sweeney*, 54 Fed. 284. *Blue Bird Co.* v. *Largey*, 49 Fed. 289. *Del Monte Co.* v. *New York Co.* 66 Fed. 212; 18 M. R. 188. *Del Monte Co.* v. *Last Chance Co.* 171 U. S. 55.

Claim owner has the right to all minerals within his vertical lines subject only to right of prior apex claimant. *Doe* v. *Waterloo Co.* 54 Fed. 935.

Title to the vein and the right to follow it on the dip, exists by statute. *Blue Bird Co.* v. *Largey*, 49 Fed. 289.

Apex rights not allowed to location in form of triangle. *Montana Co.* v. *Clark*, 16 M. R. 80.

Where apex outside of plaintiff's lines the vein on its dip within them, plaintiff has no right to enjoin apex claimant. *Id.*

Side veins have the same right to dip as the discovery vein. The same end lines determine the right upon all the lodes. *Walrath* v. *Champion Co.* 72 Fed. 978; 171 U. S. 293.

The case is stated in the opinion.

C. W. HOLCOMB, with whom was WALTER H. SMITH on the brief, for appellant and plaintiff in error.

W. W. DIXON for appellee and defendant in error.

JUSTICE FIELD delivered the opinion of the court.

The plaintiff and the defendant are owners, as tenants in common, of certain mining property in Silver Bow County, State of Montana, known as the Non-Consolidated lode mining claim. The plaintiff owns three-fourths of the claim and the defendant one-fourth. The defendant is, besides, the sole owner of the mining claim situated in the same county and State, known as the Amy lode mining claim. Both claims are located and patented under the mining laws of the United States contained in Sections 2320 and 2322 of the Revised Statutes. The Amy claim was first located and has the earlier patent.

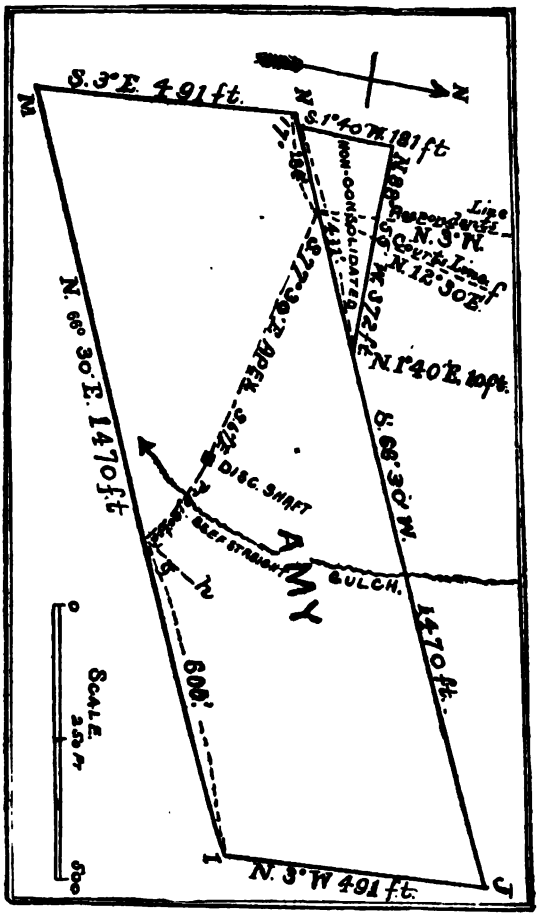
The relative positions of these two claims are seen on the diagram in the record, which shows the course of the vein in the Amy claim upon which its location was made and the boundaries of the two claims with the length and direction of each. The description of the two claims can be understood only by reference to the diagram, as each line is given. A copy of the diagram is produced on the next page, as without it the description will be unintelligible to the reader.

Extralateral rights of side veins are determined by the end lines. *Walrath* v. *Champion Co.* 63 Fed. 552.

The discovery vein controls extralateral rights of all veins. *Cosmopolitan Co.* v. *Foote*, 101 Fed. 518; *Contra, Ajax Co.* v. *Hilkey*, (Colo.) 72 Pac. 447.

An apex locator cannot follow on the dip, on the vein beyond a segment belonging to an older patent, to reach a part of the vein beyond. The ore in such part of the vein belongs to the patent above it under its common law rights. *State* v. *District Court*, 25 Mont. 504; 65 Pac. 1020.

The Amy claim has a surface length of 1,470 feet, and its side lines are parallel. The end lines are each 491 feet, and they are also parallel. The surface location forms a parallelogram of 1,470 feet running easterly and westerly, by 491 feet running northerly and southerly.



The Non-Consolidated claim lies adjoining the northwest corner of the Amy claim. Its surface shape is that of a triangle, the longest side of which joins the northerly side

of the Amy claim, and, commencing seventeen (17) feet from the northwest corner of the latter, extends easterly four hundred and eleven (411) feet in length. Its northerly side line, commencing (on the northerly line of the Amy) at the point where the first line terminates, runs in a northwesterly direction three hundred and seventy-two (372) feet to the point where it meets the westerly line of the lode, and extends southwesterly from this point one hundred and eighty-one (181) feet to the place of beginning.

The vein of the Amy claim, on its course or strike, passes through its northerly side line, as marked on the diagram, into the Non-Consolidated ground; its apex crosses that line 184 feet easterly from the west side line of that claim, and does not again enter the Amy claim. The apex of the vein enters the south side of the Amy claim at a point within 600 feet westerly from the southeast corner of the Amy, and the dip of the vein is to the north.

We have in this description of the claims in controversy followed in a large degree that given in the brief of the defendant's counsel, for the subject does not admit of greater clearness of statement.

The plaintiff has brought this action for a partition of the Non-Consolidated claim with the defendant, according to the respective rights of the parties, if that be possible; but if the property cannot be thus partitioned advantageously, then for a sale of the premises and a division of the proceeds among the owners, in conformity with such rights.

As stated above, the vein of the Amy, of which the apex lies within the surface lines of the claim, in its course passes through the northerly side line, and enters the Non-Consolidated claim; and it is alleged that the vein has been there worked by the owners of that claim and valuable ore taken therefrom. The plaintiff, therefore, prays, in addition to a partition or sale of the Non-Consolidated claim, for an accounting for his share, as tenant in common of an undivided

three-fourths of that claim, of the ores taken from the underground workings of the vein of the Amy after it had passed into that claim, if any there were.

The defendant admits his cotenancy in the Non-Consolidated claim with the plaintiff, but denies the taking of any ore from the vein of the Amy after it had passed into its ground.

The first question for determination is whether the Amy retained any right to the vein, the apex of which was within its surface lines, after it had passed through its northerly side lines, or rather through the vertical plane running down that line. If the Amy retained its right to that vein after it had entered the ground of the Non-Consolidated claim, it belonged to the defendant as sole owner of the Amy, and as such owner he could not be called on to account to the plaintiff for any portion of the ores taken from it. If, on the other hand, the Amy did not retain its right to that portion of the vein after it had passed into the Non-Consolidated claim, it became a part of that claim, and the proceeds of the ore there taken from it would, with other proceeds of the Non-Consolidated claim, be the subject of an accounting between the plaintiff and the defendant, the owners, as tenants in common of that claim. The answer to the question must be found in the construction given to section 2322 of the Revised Statutes, which took effect December 1, 1873. That section is as follows:

"The locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface

included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges."

The preceding section 2320 prescribes the extent to which mining claims upon veins or lodes of quartz, or other rock in place, bearing gold, silver, or other valuable deposits on lands of the United States, may be taken up after May 10, 1872. It allows a claim to be located to the extent of fifteen hundred feet along the vein or lode, but provides that no location shall be made until the discovery of the vein or lode within the limits of the claim located; which is, in effect, a declaration that locations resting simply upon a conjectural or imaginary existence of a vein or lode within their limits shall not be permitted. A location can only rest upon an actual discovery of the vein or lode.

The section also declares that no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface; nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at its surface; except as prevented by adverse rights existing on the 10th day of May, 1872, and that the end lines of each claim shall be parallel to each other. A claim located in conformity with the provisions of this section would take the form of a parallelogram, if the course or strike of the vein or lode should run in a straight line; but such veins and lodes are often found upon explora-

tions to run in a course deviating at different points from such line. And from this circumstance much difficulty often arises in determining the lateral rights of the locators.

Section 2324 of the Revised Statutes recognizes the power of miners in each mining district to make regulations not in conflict with the laws of the United States, or of the laws of the State or Territory in which the district is situated, governing the location, manner of locating, and amount of work necessary to hold possession of a mining claim, subject to the requirement that the location must be distinctly marked on the ground so that its boundaries may be readily traced.

It is evident from the provisions cited that the location as made and defined must control not only the rights of the claimant to the vein or lode within its surface lines, but also any lateral rights.

Section 2322, cited above, declares that the locators of all mining locations shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location; and also the exclusive right of possession and enjoyment of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface location. The surface side lines, extended downward vertically, therefore determine the extent of the claim, except when in its descent the vein passes outside of them, and the outside portions are to lie between vertical planes drawn downward through the end lines.

The difficulty in the present case arises from the course of the vein or lode upon which the Amy location was made. It is evident that what are called side lines of the location, as shown in the diagram, are not such in fact but are end lines. Side lines, properly drawn, would run on each side of the

course of the vein or lode distant not more than three hundred feet from the middle of such vein. In the Amy claim, the lines marked as *side* lines, cross the course of the strike of the vein and do not run parallel with it. They, therefore, constitute end lines. It is true the lines are not drawn with the strict care and accuracy contemplated by the statute, and which could only have been done with more perfect knowledge of the true course or strike of the vein from further developments. But, as was said by this court in *Iron Silver Co.* v. *Elgin Co.*, 118 U. S. 196, 207: "If the first locator will not or cannot make the explorations necessary to ascertain the true course of the vein, and draws his end lines ignorantly, he must bear the consequences." The court cannot become a locator for the mining claimant and do for him what he alone should do for himself. The most that the court can do, where the lines are drawn inaccurately and irregularly, is to give to the miner such rights, as his imperfect location warrants, under the statute. It cannot relocate his claim and make new side lines or end lines. Where it finds, as in this case, that what are called *side* lines are in fact *end* lines, the court, in determining his lateral rights, will treat such side lines as end lines and such end lines as side lines; but the court cannot make a new location for him, and thereby enlarge his rights. He must stand upon his own location, and can take only what it will give him under the law.

Acting upon this principle there is no lateral right to the holder of the Amy claim by which he can follow its vein into the Non-Consolidated claim. Mistakes in drawing the lines of a location can only be avoided, as said in the case cited, by postponing the marking of the boundaries until sufficient explorations are made to ascertain, as near as possible, the course and direction of the vein. * * * "Even then," the court added, "with all the care possible, the end lines marked on the surface will often vary greatly from a right

angle to the true course of the vein, but, whatever inconvenience or hardship may thus happen, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subjected to perpetual readjustment according to subterranean developments subsequently made by mine workers. Such readjustments at every discovery of a change in the course of the vein would create great uncertainty in titles to mining claims."

Applying this doctrine to the case before us, it follows that the vein in controversy, the apex of which was within the surface lines of the Amy claim, did not carry the owner's right beyond the vertical plane drawn down through the north side line of that claim. The Amy claim had no lateral right by virtue of the extension of the vein through what was called the north side of its claim, as that side line so called was, in fact, one of its end lines.

The judgment of the Supreme Court of Montana should therefore be reversed, and judgment entered in favor of the plaintiff, for a decree of partition of the Non-Consolidated claim between the parties to the suit, who are owners as tenants in common, provided such partition can be made with due regard to the respective rights of the owners, and if it cannot be thus advantageously made, that the premises be sold and the proceeds divided according to their respective rights; and further, that the respective parties render an account of the proceeds received by them, respectively, from the Non-Consolidated claim, and that such proceeds be divided between them according to their respective rights.

MOSES MANUEL v. IVER WULFF.

(152 U. S. 505. Supreme Court. March 26, 1894.)

[1]Sole right of government to forfeit from alien. A deed of a mining claim by a qualified locator to an alien operates as a transfer of the claim to the grantee, subject to question in regard to his citizenship by the government only.

[2]Naturalization relates back. In a suit supporting an adverse claim where a party who was an alien at the outset becomes a citizen during the proceedings and before judgment, his disability to take title is thereby removed.

Error to the Supreme Court of the State of Montana.

[1]*McKinley Co.* v. *Alaska Co.* 183 U. S. 565. *Tornanses* v. *Melsing*, 109 Fed. 710.

[2]*Lone Jack Co.* v. *Megginson*, 82 Fed. 89.

Citizenship of a third party may be proved by evidence of his acts and words. *Providence Co.* v. *Burke*, (Ariz.) 57 Pac. 641; 19 M. R.—.

Where one of two locators is an alien the location is valid and their joint deed carries title. *Id.*

Claim located by alien and conveyed to citizen is good, but citizen may survey over alien's location if without force. In an adverse suit both parties must prove citizenship. *Wilson* v. *Triumph Co.* 19 Utah 66; 56 Pac. 300. But see *McCarthy* v. *Speed*, 11 So. Dak. 362; 19 M. R.—.

Where an alien bought a claim located by a citizen and afterwards sold to a citizen, held that he took and passed a good title. *Gorman Co.* v. *Alexander*, 2 So. Dak. 557; 51 N. W. 346.

Stockholders of American corporation are conclusively presumed to be citizens. *Doe* v. *Waterloo Co.* 70 Fed. 455; 18 M. R. 266.

Voting and military service treated as proof of citizenship. *Strickley* v. *Hill*, 22 Utah 257; 62 Pac. 893.

Rights of co-locator with alien considered. *Id.*

The alienage of one party may defeat his own claim in an adverse suit but does not aid the location of the other. *Sherlock* v. *Leighton*, 9 Wyo. 297; 63 Pac. 580.

Right of alien to inherit is determined by State law. *Lohmann* v. *Helmer*, 104 Fed. 178.

Failure to object below that citizenship was not proved is a waiver. *Sherlock* v. *Leighton*, 9 Wyo. 297; 63 Pac. 934.

Citizenship need not be alleged or proved except in adverse claim cases. *Buckley* v. *Fox*, (Idaho) 67 Pac. 659.

This was an action in the ordinary form of a contest between two claimants of a quartz lode mining claim upon the lands of the United States to determine the right to proceed in the United States land office for patent therefor. Moses Manuel, defendant below, made application in the land office at Helena, Montana, for a patent for the Marshal Ney lode mining claim, which application Iver Wulff, plaintiff below, adversely contested, basing his contest upon his right to the Columbia mining claim. This proceeding was thereupon commenced in the District Court for Lewis and Clarke County of the Territory of Montana, in accordance with section 2326 of the Revised Statutes.

The title of the plaintiff was put in issue by the pleadings and the defendant filed a counterclaim charging that the Columbia lode location was forfeited by reason of the want of required annual work, and that the ground in controversy was unoccupied public domain at the time of the location of the Marshal Ney. This was denied by plaintiff in his replication.

Upon the trial it appeared that Henry Pflaume, who was a citizen of the United States, located the Columbia lode mining claim, July 1, 1882; that November 1, 1885, he conveyed the claim to Fred Manuel by deed, and that November 30, 1887, Fred Manuel conveyed the same property by deed to Iver Wulff, the plaintiff; that one Alfred Manuel, who was a citizen of the United States, located the same mining claim under the name of the "Marshal Ney," (claiming that the Columbia lode location had been abandoned and forfeited for the reason that no work was done thereon during the years 1883 and 1884), and conveyed to Moses Manuel, the defendant, a one-third interest therein, October 12, 1885, and the remaining two-thirds, October 15, 1887, by deeds duly executed and recorded.

It further appeared that Moses Manuel was born in Canada and came to this country when eight years old with

his father, whom he supposed had been naturalized, and that he was thus a citizen of the United States. But the Court held that he was not a citizen, whereupon he was naturalized, pending the trial, under the provisions of section 2167 of the Revised Statutes. The District Court then non-suited defendant upon his counterclaim, and did not permit him to proceed with his case, upon the ground that he was not a citizen at the time that Alfred Manuel executed to him the deeds of conveyance of the Marshal Ney lode mining claim and at the time the suit was commenced, holding that the attempt on the part of Alfred Manuel to convey the mining claim operated as an abandonment thereof. Defendant then moved that plaintiff be non-suited, which motion was denied, but the question raised in respect thereof need not be examined here. Judgment was thereupon given in favor of Wulff, and defendant took the case by appeal to the Supreme Court of the State (which had been admitted into the Union in the meantime), by which the judgment was affirmed. The opinion of the court will be found reported in 9 Montana, 279. The case was then brought to this court by writ of error.

JOHN B. CLAYBERG, for plaintiff in error, submitted on his brief. No appearance for defendant in error.

CHIEF JUSTICE FULLER delivered the opinion of the court.

The Supreme Court of Montana recognized the settled rule that an alien may take and hold land by purchase until office found, and that if the alien become a citizen before his alienage has been adjudged, the act of naturalization takes effect by relation; but held that "possessory rights to mining claims on the public domain of the United States," although "endowed with the qualities of real estate to a high degree," did not come within that rule.

The argument was that as by statute mineral lands are not open to exploration, occupation, or purchase by aliens, but only by citizens of the United States and those who have declared their intention to become such, upon compliance with the laws and local mining rules and regulations as to location and possession, title and possessory rights to mining claims thus acquirable solely by virtue of the statute and in the manner prescribed thereby, must be regarded as passing as by operation of law, and not as by grant. Hence that mining claims are controlled by the rule which forbids the alien to take or hold real estate by descent, since it is the rule of law and not the act of the party that vests title in the heir, and it would be an idle thing to vest title by one act of law and then take it away by another. The court was of opinion that upon principle the analogy between an alien heir claiming by descent and an alien miner claiming under the mining laws was complete; and that as Moses Manuel was incapable of taking, the conveyance to him by Alfred Manuel, who was a citizen, amounted to an abandonment by the latter. We are unable to concur in this view. We do not think that the transfer of a mining claim by a qualified locator to an alien is to be treated as *ipso facto* an abandonment or that the analogy of such a case to the casting of descent upon an alien can be maintained.

Among the cases often referred to upon the general subject and cited by the Montana Supreme Court is *Governeur* v. *Robertson,* 11 Wheat. 332, 350, 354. That was an action of ejectment and the facts these: Plaintiff claimed under one Brantz, who, being an alien, obtained, October 11, 1784, two grants from the Commonwealth of Virginia, of lands lying in Kentucky. He became naturalized in Maryland, November 8, 1784, and his title was confirmed to him and to his heirs and their grantees by the legislature of Kentucky in 1796 and 1799. Defendant claimed under a grant of Virginia made to a citizen in 1785.

This Court speaking by Mr. Justice Johnson, among other things said:

"On this subject of relation, the authorities are so ancient, so uniform, and universal, that nothing can raise a doubt that it has a material bearing on this cause, but the question; whether naturalization in Maryland was equivalent to naturalization in Kentucky. To this the articles of confederation furnish an affirmative answer, and the defendant has not made it a question. Nor, indeed has he made a question on the subject of relation back; yet it is not easy to see how he could claim the benefit of an affirmative answer on the question he has raised, without first extricating his cause from the effects of the subsequent naturalization, upon the rights derived to Brantz through his patent. The question argued, and intended to be exclusively presented here, is, whether a patent for land to an alien be not an absolute nullity.

"The argument is, that it was so at common law, and that the Virginia land laws, in some of their provisions, affirm the common law on this subject.

"We think the doctrine of the defendant is not to be sustained on either ground. * * *

"It is clear, therefore, that this doctrine has no sufficient sanction in authority; and it will be found equally unsupported by principle or analogy.

"The general rule is positively against it, for the books, old and new, uniformly represent the King as a competent grantor in all cases in which an individual may grant, and any person *in esse,* and not *civilter mortuus,* as a competent grantee. Femes covert, infants, aliens, persons attainted of treason or felony, clerks, convicts, and many others, are expressly enumerated as competent grantees. (Perkins Grant, 47, 48, 51, etc.; Comyn's Dig. Grant, B. 1.) It behooves those, therefore, who would except aliens, when the immediate object of the King's grant, to maintain the exception.

"It is argued that there is an analogy between this case and that of the heir, or the widow, or the husband, alien; no one of whom can take, but the King shall enter upon them without office found. Whereas, an alien may take by purchase and hold until divested by office found. It is argued, that the reason usually assigned for this distinction, to wit, *nil frustra agit lex,* may, with the same correctness be applied to the case of a grant by the King to an alien, as to one taking by descent, dower, or curtesy: That the alien only takes from the King to return the subject of the grant back again to the King by escheat. But this reasoning obviously assumes as law the very principle it is introduced to support; since, unless the grant be void, it cannot be predicated of it that it was executed in vain. It is also inconsistent with a known and familiar principle in law, and one lying at the very root of the distinction between taking by purchase and taking by descent. It implies, in fact, a repugnancy in language. Since the very reason of the distinction between aliens taking by purchase, and by descent, is, that one takes by deed, the other by act of law; whereas a grantee, *ex vi termini,* takes by deed, and not by act of law. If there is any view of the subject in which an alien, taking under grant, may be considered as taking by operation of law, it is because the grant issues, and takes effect, under a law of the State. But this is by no means the sense of the rule, since attaching to it this idea, would be to declare the legislative power of the state incompetent to vest in an alien, even a defeasible estate.

"That an alien can take by deed, and can hold until office found must now be regarded as a positive rule of law, so well established, that the reason of the rule is little more than a subject for the antiquary."

The objection here rests, however, on the assumption that Congress has not intended to confer any estate in respect of claims of this character because the right of purchase and the right of possession are indivisible, and the validity

of the location is destroyed on the transfer of the claim to a person not authorized to keep the location alive. *Tibbitts* v. *Ah Tong*, 4 Montana, 536. Of course, the same qualification required in those who may purchase is required as to those who may possess, but that, in our judgment, does not render possessory rights any the less property susceptible of distinct ownership, nor involve the consequence that their transfer to unqualified persons would operate a forfeiture *eo instanti* as for a violation of a continuing condition precedent so that the removal of the disqualification would not cure the defect. If it could be properly held that the qualification of his grantee should be regarded as at all a condition annexed to the ownership of the qualified locator, such condition would be a condition subsequent, and governed by the rule laid down in *Schulenberg* v. *Harriman*, 21 Wall. 44.

Section 2319 of the Revised Statutes is as follows:

"All valuable mineral deposits in lands belonging to the United States both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

And by section 2322, it is provided that when such qualified persons have made discovery of mineral lands and complied with the law, they shall have the exclusive right to possession and enjoyment of the same. It has, therefore, been repeatedly held that mining claims are property in the fullest sense of the word, and may be sold, transferred, mortgaged, and inherited without infringing the title of the United States, and that when a location is perfected, it has the effect of a grant by the United States of the right of present and exclusive possession. *Forbes* v. *Gracey*, 94 U. S. 762; *Belk* v. *Meagher*, 104 U. S. 279; *Gwillim* v. *Donnellan*, 115 U. S. 45; *Noyes* v. *Mantle*, 127 U. S. 348.

This being so, we are of opinion on this record that, as Alfred Manuel was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and that the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only. Inasmuch as this proceeding was based upon the adverse claim of Wulff to the application of Moses Manuel for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered.

In the matter of Krogstad, 4 Land Dec. 564, Mr. Justice Lamar, when Secretary of the Interior, ruled that, an alien having made homestead entry and subsequently filed his intention to become citizen, the alienage at time of entry, in the abscence of an adverse claim, would not defeat the right of purchase. *Jackson* v. *Beach,* 1 Johns. Cas. 399; *Governeur* v. *Robertson,* 11 Wheat. 332; and *Osterman* v. *Baldwin,* 6 Wall. 116, were cited to the point that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture and a confirmation of title. This seems to have long been the settled rule in the Land Department; *Man* v. *Huk,* 3 Land Dec. 452; *Lord* v. *Perrin,* 8 Land Dec. 536; so that if there had been no adverse claim in the Land Office, Moses Manuel's application, which appears, in respect of this question, to have been made in good faith, would not have been rejected on the mere ground of alienage when he made it. And as Moses Manuel was the grantee of a qualified locator, and became naturalized before the order, we conclude that there was error in the direction of a non-suit.

The judgment of the Supreme Court of Montana is reversed and the cause remanded with a direction to reverse the judgment of the court below and for further proceedings in conformity with this opinion.

Mr. Justice White, not having been a member of the court when this case was considered, took no part in its decision.

ANNIE B. WETTENGEL v. JAMES T. GORMLEY.

(160 Pennsylvania 559; 28 Atl. 934. Supreme Court. April 2, 1894.)

[1]**Equitable distribution of oil royalties regardless of surface divisions. Where three tracts of land, all subject to the same oil and gas lease, are devised respectively to the owner's three children, the royalties accruing under the lease are divisible among the three devisees, although all of the wells are sunk on one only of the three tracts.**

Owing to the vagrant character of oil and gas, a lease of these substances partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals.

Appeal from Court of Common Pleas, Allegheny county; Ewing, Judge.

Agreed case between Annie B. Wettengel, as plaintiff, and James T. Gormley, as defendant, to determine the right to royalties under an oil lease embracing their farms. Judgment for plaintiff. Defendant appeals. Affirmed.

[1]**Lessees having a right to bore for oil struck natural gas. *Held*, that they had no equity to be repaid the cost of sinking the well out of the proceeds of the sale of gas. *Palmer* v. *Truby*, 136 Pa. 556; 20 Atl. 516.**

No defense to covenant to sink that adjoining land had been bored and found dry. *Gibson* v. *Oliver*, 158 Pa. 277; 27 Atl. 961. *Cochran* v. *Pew*, 159 Pa. 184; 28 Atl. 219.

Sufficient test for oil by boring on lands outside of the lease. *Carnegie Co.* v. *Phila. Co.* 158 Pa. 317; 27 Atl. 951.

Lessee failing to work, equity will cancel his lease. *Cowan* v. *Radford Co.* 83 Va. 547; 3 S. E. 120.

Express covenant to drill one well; held covenant implied to sink as many wells as the land would carry, but that forfeiture did not obtain for breach of implied covenant. *Harris* v. *Ohio Co.* 57 Oh. St. 118; 48 N. E. 502.

The principle or theory on which the preceding citation and the text case proceed is found enlarged in *Kleppner* v. *Lemon*, 176 Pa. 502; 18 M. R. 404, where the court force a lessee to sink another well not called for in his lease or surrender all his acreage except the one well already sunk and an area around it arbitrarily fixed at 300 feet.

J. McF. CARPENTER, for appellant.

J. S. & E. G. FERGUSON, for appellee.

WILLIAMS, J. The question raised by this appeal is both novel and interesting. It is presented upon the following facts: James Gormley was, in his lifetime, the owner of three contiguous farms, containing together about 600 acres. In July, 1888, he made an oil lease to Tomlinson, covering all the land. It was to run for 15 years, and reserved a royalty, upon all the oil produced, of one-eighth. The lease gave the lessee the usual privileges upon the land, among which was the right to take water from any part of it, and to any extent needed in his operations; a right of way into and over the body of the land; a right to lay pipe lines to conduct the oil from the wells. It concluded with the following stipulation: "It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, and assigns." The lessor died on October, 1890. By his last will and testament he gave one of these farms to each of his three children in fee, making no mention of the lease, which included them all. The devisees have entered into possession of their respective farms under the will of their father, and each holds in severalty. The holder of the oil lease has, meantime, put down several oil wells, and is producing oil therefrom. These wells happen to be on the farm devised to James T. Gormley, the defendant, and he claims the entire royalty. The question is thus seen to be, who is entitled to the royalty reserved by the ancestor? Should it be devided between the three devisees in proportion to the acreage held by each, or should it be paid to James T. alone? The answer to this question must depend partly upon the character and legal effect of the lease, and

partly on the nature of the product obtained under it. If the lease had been the ordinary agricultural lease, reserving a fixed annual rent payable in money, it would not be doubted that the fee descended to the devisees subject to the estate for years held by the tenant. The lessor could not change the rights of the lessee, or disturb his covenants, by a division of the land into parts, and a devise of these parts to separate devisees. All the devisees together take the place of the devisor, and receive the rent due as an entire sum from the tenant. It would not matter that the grain was grown on one of the divisions, the grass upon another, while the third was unimproved and covered with forest; their interests would be several as to each other under the terms of the will, but as to the tenant they would be undivided under the terms of the lease made by their ancestor, and covering the land at the time of his death. But this was not an agricultural lease. It was an agreement known as an oil lease. It conferred an exclusive right upon the tenant to take the oil that might underlie the whole 600 acres, and gave him 15 years within which to take it. It was, in its legal effect, a sale of the oil, for the removal of which the surface and the subsurface were subjected to the necessary servitudes. The subsequent division of the body of land by the lessor could not divide or diminish the privileges of the lessee or change his covenants. The lessee may locate his wells where he pleases, regardless of the interests of the devisees of his lessor. He may distribute them over the 600 acres, or locate them all on one of the divisions. He may crowd the lines of the adjoining divisions so as to enable him to draw the oil from them without drilling upon them, and in this manner deplete, ultimately, the whole territory by operations conducted on the farm of one of the devisees. It is well understood among oil operators that the fluid is found deposited in a porous sand rock, at a distance ranging from 500 to 3,000 feet below the

surface. This rock is saturated throughout its extent with oil, and, when the hard stratum overlying it is pierced by the drill, the oil and gas find vent, and are forced by the pressure to which they are subject, into and through the well, to the surface. After this pressure is relieved by the outflow, the wells become less active. The movement of the oil in the sand rock grows sluggish, and it becomes necessary to pump the wells in order both to quicken the movement of oil from the surrounding rock, and to lift it from the chamber at the bottom of the well to the surface. An oil or gas well may thus draw its product from an indefinite distance, and in time exhaust a large space. Exact knowledge on this subject is not at present attainable, but the vagrant character of the mineral, and the porous sand rock in which it is found and through which it moves, fully justify the general conclusion we have stated above, and have led to its general adoption by practical operators. For this reason, an oil lease partakes of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals. In the case of a coal lease, for example, the exact location, with reference to lines on the surface, of every pound of coal taken, may be easily determined. The stratum of coal is as fixed and permanent in its character as are the strata of superincumbent rocks and earth. Its ownership, as between several devisees or heirs at law after partition made, is as easily determined as that of the surface. The removal of the coal from one purpart does not diminish or disturb that which underlies another. The lines that divide the surface divide, with absolute fairness to all concerned, the subsurface, and secure to the several owners with certainty the mineral that belongs to each. The rules applicable to coal leases, or leases of land containing any other solid mineral, are therefore not always capable of application to leases for the production of oil or gas, because of the difference between the solid and the

fluid minerals, and because of the deficient conditions under which they are found and brought to the surface. There is in this state no precedent that we are constrained to follow, and we cannot find that the question has been decided in any other of the oil-producing states. We are in a position, therefore, to consider and determine it on principle. For the reasons now briefly outlined, we concur in the conclusions reached by the learned judge of the court below.

The judgment is affirmed.

ANVIL MINING CO. v. JOHN HUMBLE ET AL.

(153 U. S. 540; 14 S. C. Rep. 876. Supreme Court. May 14, 1894.)

[1]Right to terminate if prejudicial to good mining. A contract by which plaintiffs agreed to mine iron ore from defendant's mine by the caving system gave defendant the right for terminating the contract whenever it should decide that such system of mining was "prejudicial to the future welfare and development of said mine." *Held*, that this gave defendant no right to arbitrarily terminate the contract, and having stopped plaintiffs from continuing the work, without even pretending to have determined that the system would be prejudicial, it was liable in damage for breach of the contract.

[2]Percentage of iron. A contract provided that plaintiff should mine for defendant, at so much per ton, the iron ore contained in the first level of defendant's mine, such ore to contain at least 56 per cent. metallic iron. Subsequently the parties stipulated that the contract should extend to the ore contained in the second and third levels, "with the exception that the merchantable iron ore extracted under this contract shall contain at least 58 per cent. or upwards of metallic iron." *Held*, that the 58 per cent. applied only to the ore in the second and third levels.

Prospective profits in mining ore from a certain level at so much per ton are not conjectural and speculative, so as to prevent recovery, when the evidence shows the cost of past mining, the condition in which the mine was left, and, while not showing with certainty the amount of ore remaining in the level, is yet sufficient to enable the jury to make a fair and reasonable finding in regard thereto.

---

[1]*Baltimore Co.* v. *Brydon*, 65 Md. 198, 611; 9 Atl. 126.

[2]*Martinez* v. *Earnshaw*, 143 Pa. 479; 22 Atl. 668. *Fox* v. *Mackay*, 125 Cal. 54; 20 M. R.—

A vendee is entitled to an allowance for defect in quality of slate sold but must prove the defect. *Pratt* v. *Paules*, (Pa.) 4 Atl. 751.

Construction of contract between miner and ore buyer as to assays, delivery and prices. *Trotter* . *Heckscher*, 40 N. J. Eq. 612; 4 Atl. 83.

A contract for the sale of the entire output of certain coal mines on certain specified terms and conditions cannot be construed to be made with reference to the coal miners times to work so as to keep the mine going all the time. *Shipman* v. *Saltsburg Coal Co.* 62 Fed. 145.

Measurement of engineer when fraudulent, not binding. *Mills* v. *Norfolk Co.* 90 Va. 523; 19 S. E. 171.

Right to repudiate after breach. An instruction that if defendants interfered with, hindered, and prevented plaintiffs in the performance of the contract between them to such an extent as to render performance difficult, and greatly decrease plaintiff's profits, then such interference would justify plaintiffs in abandoning the contract and suing for damages, is not open to the objection that it permits a party to rescind a contract, and at the same time recover damages for its non-performance; for it merely asserts the right of one party to treat the contract as broken when the other party is guilty of a breach.

Explaining letter. Contractors with a company to work its mine wrote its general manager a letter, stating that the first level of the mine was practically exhausted; but afterwards, in a suit against the company for preventing them from working, claimed loss of profits on ore in that level. *Held*, that the letter did not preclude them from showing the facts, or from testifying that it was written at the solicitation of the company's superintendent, to accomplish a wrongful purpose on his part.

Statements by the bookkeeper of a mining company as to his reasons for refusing to allow a contractor to see and copy railroad weigh bills in his possession, which by the contract were made the evidence of the amount of the contractor's compensation, are competent evidence as against the company.

In error to the Circuit Court of the United States for the western district of Michigan.

This was an action by John Humble, Joseph H. Johns, and James Johns, partners as Johns Bros. & Humble, against the Anvil Mining Company, to recover for work done under a contract, and for damages for an alleged breach thereof by defendant. The action was commenced in a state court, but was removed to the circuit court by defendant. Joseph H. Johns having died, the action was revived in the name of the surviving partners. Verdict and judgment were rendered for plaintiffs, and defendant sued out this writ of error.

On May 1, 1888, John Humble, Joseph H. Johns, and James Johns, who were partners doing business under the firm name of Johns Bros. & Humble, entered into a contract with the Anvil Mining Company for mining iron ore. The

provisions of the contract, so far as they are material, are that:

"They, the said party of the first part, shall and will, in a good and workmanlike manner, and at their own proper charge and expense, mine, remove, and load into the skips all the merchantable iron ore contained on or above the first level of the mine now owned and worked by the said Anvil Mining Company at its No. 1 shaft, in said township of Bessemer. The said ore shall be mined and removed by what is known as the 'caving system,' and the ore removed shall be at least seventy-five per cent. (75 per cent.) of the merchantable iron ore contained on or above said first level, and shall be worked, taken out, and removed in such manner as not to interfere with the future workings and development of said mine. Said party of the first part shall work said mine to its full capacity, and remove the ore therefrom without unnecessary delay, and shall mine from said level at least two hundred (200) tons of merchantable iron ore per day; that is, the average amount of ore removed each month shall not be less than two hundred (200) tons per day.

"It is understood and agreed between the parties hereto that, should it be determined by said second party that the ore from the second and third levels of said mine can be removed and extracted by the caving system of mining, or by the same system practiced in removing the ore from the said first level, that this contract, at the option of said second party, shall extend to and include the ore contained on and above the second and third levels of said mine.

"It is also agreed that it shall be entirely optional with said party of the second part to extend the contract to the ore below the second level, and that the said party of the second part shall have the right of terminating this contract and the said system of mining at any time when said second party shall decide that said system is prejudicial to the future welfare and development of said mine; equitable compensation

to be made said party of the first part for damage suffered by them by reason of the said party of the second part so terminating this contract; and, should said parties be unable to agree upon the basis of settlement, then the matter shall be left to two disinterested mining superintendents,—one to be chosen by the party of the first part, and the other to be chosen by the party of the second part,—and, in case said referees fail to agree, they shall choose a third; and the decision of said referees, or the majority of them, shall be final and conclusive upon the parties hereto as to the compensation to be made said party of the first part because of the termination of this contract.

"The said party of the first part agrees that the said party of the second part shall have the use of number one shaft for the purpose of raising either rock or ore from said mine in the sinking of said shaft and developing said mine below the first level. This privilege to use number one shaft is to be considered to apply only to the removal of ore, rock, or other material necessary to be taken out in sinking said shaft, and in drifting, cross-cutting, and opening the lower levels.

"The ore to be taken out by said party of the first part under this contract shall be merchantable iron ore, containing at least fifty-six (56) per cent. or upwards of metallic iron, and no ore of lower grade shall be accepted or paid for by the said party of the second part.

"The said party of the first part are to mine said ore, and place the same in the skips at No. 1 shaft in said mine, ready for hoisting, the ore to be hoisted at the expense of the said party of the second part, who agree to furnish all necessary power to properly run the skip in said No. 1 shaft for the purpose of hoisting the ore mined and placed therein by the parties of the first part, but this covenant shall not deprive the party of the second part of the right to use said skip for the purposes and in the manner hereinbefore provided. In case of any accident to said machinery, said party of the

second part shall not be liable for any damages sustained by said party of the first part, caused by delay in replacing or repairing said machinery, provided the said party of the second part shall cause the same to be replaced or repaired with all reasonable diligence.

"The said party of the first part are to take out all the ore which can possibly be taken out under the caving system of mining, and in no case shall the amount taken out be less than seventy-five (75) per cent. of the ore contained therein, as above agreed.

"The party of the second part are to have the right or privilege of superintending and directing said work, and for that purpose to enter said mine, and inspect the works thereof, at any time, for the purpose of seeing that the work is properly conducted by the said first party, and that the work so done is not prejudicial to the future interest and working of said mine.

"It is further expressly stipulated and agreed that the said party of the second part shall not, under any circumstances, be liable for any damage or injury to either person or property by reason of the carelessness or negligence of the said party of the first part, or of their workmen, apprentices, or other persons in their employ, in the furtherance of this contract, and that the said party of the first part shall and will indemnify and forever save harmless the said party of the second part from all actions, claims, suits, and damages by reason thereof. In consideration whereof the said party of the second part convenants and agrees to and with the said party of the first part to pay to them, the said party of the first part, the sum of sixty cents (60 cts.) for each and every gross ton of merchantable iron ore mined and removed by the said party of the first part from the said mine under this contract, each gross ton to contain two thousand two hundred and forty (2,240) pounds avoirdupois. The amount of ore shipped from said premises, and the

amount due said party of the first part therefor, shall be determined by and based upon the weights as ascertained by the reports of the railroad company or companies, made to said party of the second part, of the shipment of the ore from said mine, in case of the shipment of the ore so mined from said premises."

This contract was subsequently extended by the following stipulation, dated the 10th day of July, 1888:

"It is mutually agreed by the parties to the within agreement that this contract shall extend to and include the ore contained on and above the second and third levels, as named therein, with the exception that the merchantable iron ore extracted under this contract shall contain at least 58 per cent. (fifty-eight per cent.) or upwards of metallic iron."

The firm commenced the work soon after this contract was entered into, and continued it until the 11th of October of that year. On February 11, 1889, they began this action in the circuit court of the state of Michigan for the county of Gogebic to recover for work done and damages sustained. The defendant removed the case to the federal court, where issue was joined, and the case went to trial before a jury, which, on September 16, returned a verdict for the plaintiffs in the sum of $5,943.79. Pending the proceedings in the trial court one of the plaintiffs, Joseph H. Johns, died, and the suit was revived in the name of John Humble and James Johns, the surviving partners. Upon the verdict as returned judgment was entered, and to reverse such judgment the defendant sued out this writ of error.

DANIEL H. BALL and JAMES G. FLANDERS, for plaintiff in error.

EDWIN F. UHL, FRANK KUTTS and BIRNEY HOYT, for defendants in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The claims of the respective parties, as stated by the court in its charge to the jury, are briefly these: Plaintiffs claimed —First, an amount unpaid for ore mined in September and October; second, wages which they had paid during certain periods when they were delayed in the prosecution of the work by the fault of the defendant; and, third, the profits which they would have made if the defendant had not prevented them from completing the contract. On the other hand, the defendant claimed—First, excessive freights paid by reason of a failure on the part of the plaintiffs to produce the ore seasonably; second, damages for a failure to bring out that per cent. of the ore which by the contract plaintiffs had agreed to take out of the mine; and, third, damages on account of the unskillful working of the mine.

The first claim of the plaintiffs, to wit, for ore mined in September and October, is not disputed. With regard to the second, the court accepted the rule of law agreed upon by counsel for both parties, and therefore there is no dispute as to that. The controversy is in respect to plaintiff's claim for profits, and here many questions are discussed by counsel. We shall, in our examination of them, follow the order in which they are presented in the brief of defendant's counsel. The first objection to any recovery under this claim is that by the very terms of the contract the defendant was at liberty to terminate it at any time, and hence it is insisted that, even if it did so, plaintiffs were not entitled to recover any profits which they might have made had it not been terminated; that coupled with the right to terminate was a special provision, to wit, an award of referees for estimating the damages which the plaintiffs should sustain in consequence of such termination, and that no attempt to secure such an award was alleged or proved. To this it may be replied that the contract did not give to the defendant a right arbitrarily to terminate the contract, but only when it determined that the caving system was "prejudicial to the future welfare and

development of the mine," and that there is no pretense that it ever made such determination. On the contrary, the defendant set up as a defense that the plaintiffs abandoned the work, and thus broke the contract, and that it suffered great damage thereby, and on the trial the whole scope of its testimony in this respect was in denial of the charge that it had stopped the plaintiffs from continuing the mining of ore, or in any manner sought to terminate the contract. For aught that appears to the contrary in this record, the defandant now, as ever, believes that the caving system is not only not prejudicial, but the best method of working the mine, and broke the contract with plaintiffs only for the sake of giving it to another party.

A second matter of dispute, and one which bears upon the rightfulness of the conduct of the respective parties pending the work, arises on the construction to be given to the stipulation of July 10th. The original contract provided that the ore should contain at least 56 per cent. of metallic iron, and that no ore of lower grade should be accepted or paid for by the company. The contention of the defendant is that this stipulation modified the contract so that thereafter all the ore taken from the mine, in order to be accepted, must contain at least 58 per cent. of metallic iron, while the plaintiffs insist that this only applied to the ore from the second and third levels; that from the first level being subject to the provision of the original contract, to wit, 56 per cent. of metallic iron. We agree with the plaintiffs in their construction of the stipulation. The original contract was only for removing ore from the first level, the company having, however, the option to extend it to the second and third levels. This stipulation provides for such an extension, but it is made expressly subject to "an exception." The use of the word "exception" indicates that something is taken out from the principal matter provided for in the clause or paragraph in which the word is found, and not that something is taken out of or

changed from other provisions in other clauses of the entire contract. It will be borne in mind that this is an independent agreement, made at a subsequent time, though supplemental to and in extension of the original contract; and while, for a full understanding of the scope of the obligations created by it, the original contract must be referred to, yet in determining the import of the language used it is to be construed as an independent agreement, and when it makes an extension of the obligations of the plaintiffs to a new matter anything which is stated as an exception is to be taken as an exception to the obligations assumed in respect to this additional matter. If the intent was to change the stipulation as to the first level, some other word than "exception" would unquestionably have been used. It is unnecessary to refer to extrinsic testimony, of which there was some, and of great significance, in order to establish the meaning of this stipulation; for, standing by itself, the fair and reasonable construction is that the stipulation as to the increased per cent. was applicable only to the ore taken from the second and third levels, while as to the first level there was no change.

A third proposition of defendant is that, "under the facts in this case, the damages claimed for loss of profits were too uncertain, contingent, and conjectural to found a verdict upon." Profits which are a mere matter of speculation cannot be made the basis of recovery in suits for breach of contract, while profits which are reasonably certain may be. As said by Mr. Justice Lamar in *Howard* v. *Manufacturing Co.*, 139 U. S. 199, 206, 11 Sup. Ct. 500: "But it is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness, or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably pre-

sumed that they were within the intent and mutual understanding of both parties at the time it was entered into." See, also, *Cincinnati Co.* v. *Western Co.*, 151 U.S. 200, 14 Sup. Ct. 523.

Now, there was in this case testimony to show the cost of mining each ton of ore, and also the amount of ore remaining in the first level of the mine at the time the work stopped. From these figures the profit which would have been made by the plaintiffs if they had completed the work of mining all the ore on the first level is a mere matter of multiplication. It is true that the cost of mining the remaining ore might differ from that of mining the ore which had already been taken out; but still proof of the cost of taking out that which had been mined, and of the condition of the mine as it was left, furnished a basis upon which a reasonable estimate could be made as to the cost of extracting the remaining ore. Equally true is it that there was no mathematical certainty as to the amount of ore remaining in the mine; yet both plaintiffs and defendant furnished testimony as to such amount, and testimony which, while not such as to put it beyond doubt, was sufficient to enable the jury to make a fair and reasonable finding in respect thereto. The case is one, therefore, in which the profits are not open to the objection of uncertainty, and certainly not to that of remoteness, for they would have been the direct result of carrying on the contract to a completion, and were obviously within the intent and mutual understanding of both parties at the time it was entered into.

Again, it is insisted that there was no evidence that the plaintiffs were stopped and prevented from going on with the contract, but this is a mistake. While there is no pretense that the plaintiffs were forcibly removed from the mine, there was testimony that they were directed to quit. One of the plaintiffs, John Humble, gave this account of a conversation

held in October with the defendant's superintendent, and their action in consequence thereof:

"We worked from the 9th to the 11th, and then Mr. Bennett stopped me again. We had worked half a day, and at dinner time my partner and I were going together to the dry house, and Mr. Bennett came to us and said: 'You boys can stop in that third level altogether.' 'Well,' says I, 'you mean to bring our tools out?' 'Yes,' says he, 'you can run what ore you have broken in the first level, and quit.' Then we went down and stopped the men in the lower level, and commenced to run out what we had in the first level, and we sent out all the tools in the mine, and left. We got out all the ore we had broken on the foot-wall lens. There was no more ore left there to break except the pillar."

John Rowe testified that the defendant's superintendent told him that if he could get the plaintiffs out he would let him have the contract, and that by the superintendent's orders he ordered them to stop work. It must be borne in mind that the plaintiffs were making a profit of some 30 cents a ton in carrying on this mining, and it is hardly to be presumed that they were desirous of giving that up, and more reasonable to believe that they quit under compulsion.

In view of the verdict of the jury, which is equivalent to a finding that the defendant had broken the contract, it is unnecessary to inquire as to whether there was any error in the instructions of the court as to damages recoverable by the defendant in case the jury should find that the plaintiffs had broken the contract. It may also be remarked in passing that the court excluded from the consideration of the jury the amount of ore remaining in the second and third levels, and limited the recovery to the profits which the plaintiffs would have made if they had been permitted to continue the work so far as to remove all the ore from the first level.

Defendant also complains of the following instruction:

"If the jury find from the evidence that the plaintiffs were

in good faith endeavoring to carry out and perform said contract according to its terms, and the defendant wantonly or carelessly and negligently interfered with and hindered and prevented the plaintiffs in such performance to such an extent as to render the performance of it difficult, and greatly decrease the profits which the plaintiffs would otherwise have made, then and in such case such interference was unauthorized and illegal, and would have justified the plaintiffs in abandoning the contract, and would have entitled them to recover such damages as they actually suffered by being hindered and prevented from performing such contract."

It is insisted, and authorities are cited in support thereof, that a party cannot rescind a contract, and at the same time recover damages for its nonperformance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken, and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. Such an abandonment is not technically a rescission of the contract, but is merely an acceptance of the situation which the wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the nonperformance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party; and, if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue

for the damages which it has sustained by reason of the non-performance which the other has caused.

In the course of the trial a letter was produced, signed by the plaintiffs, and directed to the general manager of the company, in which was a statement that the first level had been practically exhausted of all commercial ore, and that not to exceed 5 per cent. was left in it. The defendant insisted that this letter was conclusive upon the plaintiffs, but the court permitted testimony on their part to the effect that this letter was written at the solicitation of defendant's superintendent, who said to one of them that some one was reporting to the company that "they were leaving lots of ore in the first level, and he wanted to have this letter written by us to take the blame off of his back," suggesting at the same time that, if anything good was discovered in the bottom level, to keep it quiet, and that they could make some money out of a speculation in the stock. The court instructed that this letter had "considerable value," as being "a statement in writing" of a party, but also that it was not conclusive, and, if the testimony satisfied the jury that the facts were not as stated, they were at liberty to so find. We see nothing in this ruling of which the defendant can complain. There was nothing in the way of estoppel in such a letter, and, even if the plaintiffs had written it voluntarily, and without any solicitation, they would not have been precluded from showing the actual facts. Much more is this the case if, as stated, the letter was written at the solicitation of the defendant's superintendent, and to accomplish a wrongful purpose on his part.

Another matter is this: The contract provided that "the amount of ore shipped from said premises, and the amount due said party of the first part, shall be determined by and based upon the weights as ascertained by the reports of the railroad company or companies, made to said party of the second part of the shipment of the ore from said mine." In the bill of exceptions is this statement of what took place

when one of the plaintiffs (John Humble) was on the witness stand:

" 'In order to get information as to the amount of ore shipped, I had to go to the office, and ask the bookkeeper, and he gave me 3,610 tons for the month of May. I asked the bookkeeper to give us the weigh bills so that we could copy them off. There was no one present but the bookkeeper when I made this application.'

"The witness was then proceeding without further interrogatory to state what the bookkeeper said to him in answer to his application. Defendant's counsel objected thereto as irrelevant and incompetent, but the court overruled said objection, and to said ruling defendant's counsel excepted.

"The witness proceeded: 'He, the bookkeeper, told me Mr. Bennett's orders were to lock those weigh bills in the safe, and keep them, and give us our account off the books. The next day I asked Mr. Bennett, in the office, in the presence of the bookkeeper, to give us those weigh bills, and he said there was no need of it as long as they copied them off from the books; that was good enough for us.' "

It is insisted that there was error in permitting the witness to give the statements of the company's bookkeeper, on the ground that such bookkeeper had no authority to speak for the company; that his admissions were not the admissions of the company; and that what he said was mere hearsay, and tended to prejudice the jury against the company. There is no force in this objection. By the terms of the contract the amount due the plaintiffs was to be determined by the weigh bills. They were in the possession of the bookkeeper, an officer of the company, and one of the plaintiffs applied to that officer for those bills. The reply of such officer, in possession of that made by the contract the evidence of the amount due the plaintiffs, was competent testimony. If there were any doubt as to its competency, the objection to it would be obviated by the fact that the next day the superintendent

practically assented to the truth of the statement, and if the plaintiffs did not produce the weigh bills, they certainly had a right to show why they were unable to do so, the efforts they had made to obtain them, and how it was that they failed.

These are all the questions that we deem it important to consider. We have examined the record very carefully, and find nothing in the rulings of the court of which the defendant can justly complain; and while, in view of the conflicting testimony, there is room for difference of opinion as to what the facts really were, there was testimony which, in amount and character, was sufficient to uphold the verdict of the jury, and, of course, under those circumstances, its determination is conclusive upon those questions of fact.

The judgment will be affirmed.

CONSOLIDATED WYOMING GOLD MINING CO. v. CHAMPION MINING CO.

(63 Federal 540. Circuit Court of the United States, Northern District of California. Aug. 13, 1894.)

[1]**Where two veins unite on the dip,** the oldest location holds the vein below the plane of union.

Lode leaving after general parallelism to side lines. Where a lode leaves both side lines of the patent, yet if it follows more nearly parallel to the side lines than to the end lines it has the right to follow the lode on the dip between the points of departure. (Obiter.)

Lode line on diagram of patent. Extralateral rights of a locator are determined by the position of the vein in the earth within his boundaries with reference to his end and side lines, and where the patent as in this case contains on its plat a line purporting to give the supposed course of the lode, such theoretical line on the diagram is entitled to no weight.

[2]**The mining act of 1866** did not require parallelism of end lines, and a lode locator under that act has the right to follow the lode on its dip, and the court will assume such an end line and draw a parallel to it so as to give the location on the dip the full length it is entitled to on the strike.

[3]**Two walls held necessary.** To constitute a vein it is not necessary that there be a clean fissure, filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form, and be well-defined, with hanging and foot walls.

Proof of conditions beyond ground in controversy. On the question of whether two veins unite in disputed ground it may be shown that their directions outside of as well as within the disputed ground are such that, if continuous, they would meet.

Lode crossing one side line. Where a vein enters an end line and continues nearly parallel with the side lines for the greater part of the

---

[1]*Champion Co.* v. *Cons. Wyoming Co.* 16 M. R. 145. *Little Josephine Co.* v. *Fullerton*, 17 M. R. 664.

[2]*Carson City Co.* v. *North Star Co.* 83 Fed. 658; 19 M. R.—

[3]In Montana under a statute since repealed it was held that a discovery shaft must show at least one wall of the lode. *Foote* v. *National Co.* 9 M. R. 605. *O'Donnell* v. *Glenn*, 8 Mont. 248; 19 Pac. 302.

In the absence of such statute it is held that a wall is not essential to prove the existence of the lode. *Fleming* v. *Daly*, 12 Colo. App. 440; 55 Pac. 947. *Iron S. Co.* v. *Cheesman*, 116 U. S. 530. *Hyman* v. *Wheeler*, 15 M. R. 519. *Burke* v. *McDonald*, 17 M. R. 325.

length of the claim, the owner is not deprived of extralateral rights because the vein crosses a side line before reaching the other end line, but his extralateral rights will extend from the end at which the vein enters to the point at which it crosses the side line.

Burden of proof on apex claimant. Under R. S. § 2322, giving a locator the right to all veins throughout their entire depth, the apexes of which lie within the surface lines of his claim, though in their course downward they extend outside the vertical side lines of the claim, a locator cannot take mineral from the claim of another without showing by a preponderance of evidence that it is a part of a vein having its apex in his own claim.

Injunction—Accounting. In case of trespass on a mining claim it is not necessary to bring separate actions for injunction and an accounting but both may be had in the same suit.

Action by the Consolidated Wyoming Gold Mining Company against the Champion Mining Company. Decree for complainant.

JOHN M. WRIGHT and W. S. WOOD, for complainant.

EDWARD LYNCH and LINDLEY & EICKHOFF, for respondent.

HAWLEY, District Judge. This is an action of trespass, with a prayer for equitable relief, for an accounting, and an injunction. It was commenced in the superior court of Nevada county, and removed to this court by respondent, upon the ground that it involved a construction of the United States statutes relating to mining claims.

1. A motion was made by complainant to remand the cause to the state court upon the ground that there was a prior judgment in the state court between the same parties, which left no issue to be litigated except the fact and extent of the trespass, and that no federal question was involved. This motion was denied, and a plea in abatement to the jurisdiction of this court was overruled by the circuit judge. Complainant is the owner of the Wyoming and Ural quartz lodes and mines, for each of which it has a United States patent. The

patent for the Wyoming lode was issued September 19, 1874, and is based upon a location or occupancy of the lode claim prior to 1872. The patent recites the fact that it is granted under the law of 1866, and the acts amendatory thereof of 1870 and 1872. It grants 2,270.40 linear feet of the Wyoming lode and certain surface ground, which is particularly defined by metes and bounds. The patent to the Ural lode for 2,000 linear feet and the surface ground was issued May 12, 1880. It recites the fact that it is issued under certain sections of the Revised Statutes of the United States, which includes the statutes of 1866, 1870, and 1872. Both of said patents contain a grant of the mining premises substantially in the language of section 2322, Rev. St. U. S. The respondent is the owner of the New Year's and New Year's Extension, upon which it particularly relies, and of the Climax and certain other claims, which need not be specifically mentioned, and its title thereto is evidenced by a certificate of purchase from the United States land office, which is admitted to be equivalent to a patent from the government. The title of complainant to its Wyoming and Ural claims is prior in point of time to that of the respondent to its claims. There is no dispute whatever as to the surface lines of the respective claims. It is admitted by complainant that whatever its rights to the Wyoming and Ural lodes were prior to its application for a patent, when it had these claims surveyed by the United States surveyor, and permitted him to draw the end lines, it is estopped, under its patent, from any further claim outside of the lines that were fixed by the surveyor, and that its extralateral rights—which constitute the principal bone of contention in this case—are confined to planes drawn downward through the end lines of the survey, and extended indefinitely, and that at a certain depth these end-line planes would come together, and its extralateral rights would be entirely cut off. The former judgment in the state court was rendered in an action brought by the Champion Gold Mining Company

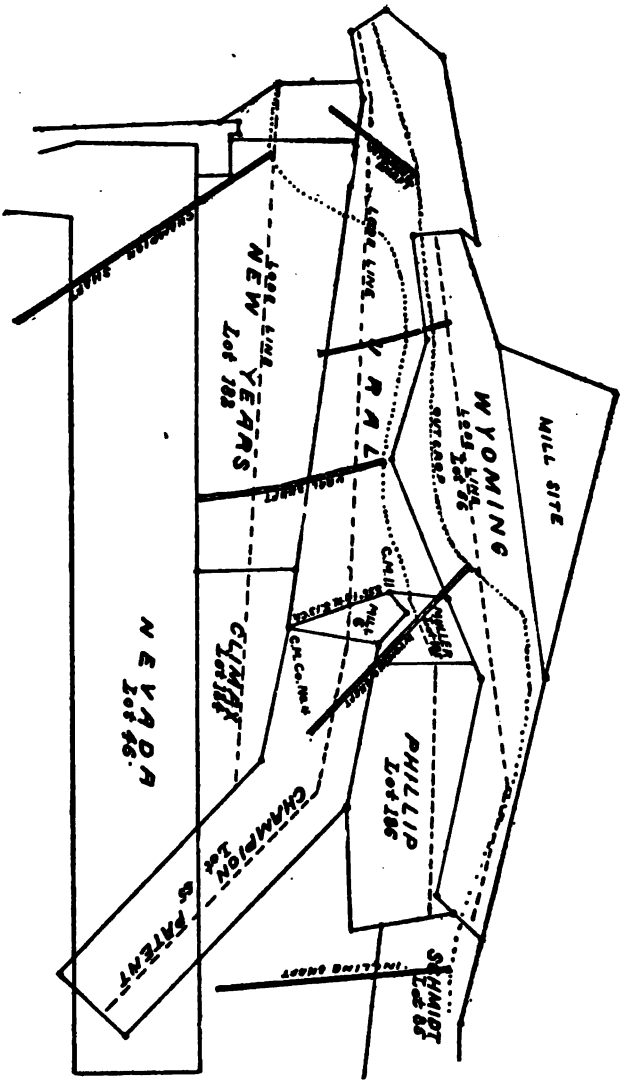
(respondent in this action) against the Consolidated Wyoming Company (complainant here). The trespass there alleged was upon the Philip ground belonging to the Champion,—which is not here involved,—but the Champion in that action set up its title to the Philip, Champion, Climax, New Year's, New Year's Extension, and the Annex mining claims, and included the ground in controversy in this action. The question of end lines was there in issue, and the court found that a certain course described in the pleadings was the course of the southern end line of the Ural quartz mine. The question of the junction of the Wyoming and Ural lodes was also presented. The judgment in that case reads as follows:

"Now, therefore, it is considered, adjudged, and decreed that plaintiff have judgment against the defendant for the sum of one hundred and twenty dollars, with its costs therein expended up to the time of filing of the answer to the amended complaint; that plaintiff is not entitled to any injunction or other relief against defendant; that defendant is entitled to work its Wyoming mine along and all points below the junction thereof with the Philip mine of plaintiff, and that it is entitled to work both its Wyoming and Ural mines at any point below where either of said mines, on its dip, may unite with the New Year's or Climax or New Year's Extension or Annex mines of the plaintiff; and that defendant have and recover its cost herein expended since the filing of its said answer to amended complaint."

An appeal was taken to the supreme court, and the judgment was affirmed. *Champion M. Co.* v. *Con. Wyoming M. Co.*, 75 Cal. 78, 16 Pac. 513. The admissibility of this judgment as evidence was passed upon by the circuit judge in deciding that this court had jurisdiction of this case, and these questions will not be reviewed.

The following diagram shows the surface boundaries of the respective claims and the lode lines of the respective lodes as defined and represented in the patents, and contains the stipulation of the parties in regard thereto, and with reference to the former judgment between the same parties in the state court. [See Diagram A.]

The lode lines represented on this diagram are ideal, as



distinguished from the actual lines of the lodes as shown by the testimony. The line of outcroppings of the Wyoming and Ural lodes, with the underground workings of the Wyoming

and Champion companies, are shown upon the following diagram. [See Diagram B.][1]

The outcrop of the respective lodes upon the surface is not continuous nor well-defined, but it has been exposed in a sufficient number of places to show—when taken in connection with the underground workings—that the general course of the croppings as delineated on the diagram is substantially correct. The apex of the Wyoming lode is clearly established within the surface boundaries of the Wyoming claim, and the lode extends throughout the entire length of said claim through the northern and southern end lines thereof. The apex of the Ural is shown to be in the Ural claim, and the lode extends from the northerly end line through the claim in a southerly direction for about 1,400 feet, and then crosses the eastern side line of the Ural as delineated on the diagram, at a point about 600 feet from the southerly end line of the Ural surface location. The walls of the Wyoming lode are both slate, and in the testimony the Wyoming is called the "slate" vein. The Ural lode has a hanging wall of granite or diorite, and the foot wall is slate, and this is called the "contact" vein. The slate vein extends downward into the earth, at an angle of about 25 degrees to the southeast. The contact vein extends downward in the same general direction at an angle of about 35 degrees.

There are numerous controverted questions of fact, as well as of law, that will have to be solved in order to determine the rights of the respective parties.

2. Before discussing any of the controverted, conflicting, and somewhat complicated questions of fact, it is proper to say that both parties had several large maps carefully drawn,

[1]The two plats A and B in the Federal Report are obscure. The plat on page 117 is condensed from them and meets the references of the Court to diagrams much more clearly. The stipulation stated that the map was correct and that the several claims were the same claims of the same names involved in the State Court case referred to on page 116.

and prepared in such a manner as to materially aid them in presenting the testimony of the respective witnesses in a clear and concise manner. Each party also introduced a large model of the underground workings, by reference to which the court was able to follow the witnesses as they gave their testimony concerning their examination of the several drifts, tunnels, upraises, winzes, and levels exposed in the underground workings of the respective claims. The testimony was presented, and the whole case tried, in an intelligent and satisfactory manner. Counsel were fair and courteous to the court, to the witnesses, and to each other. Questions not in real dispute were readily admitted. Each party pursued a similar line of examination by introducing first their surveyors; second, the superintendent or underground foreman; third, practical and experienced miners; and, fourth, one expert on each side. The witnesses were intelligent men, and favorably impressed the court that they intended to tell the truth, and detail the facts as they appeared to them, without any hesitation or equivocation. Both counsel and witnesses demeaned themselves throughout the long and tedious trial in such a manner as to receive the commendation of the court for their honesty, frankness, ability, and courtesy. The case was tried with extreme caution, so as to cover every possible phase that might be taken of the numerous questions involved. The result is that many of the questions raised and much of the testimony taken became unimportant in the light of the conclusions reached by the court. It is not deemed necessary to enter into any extended statement of the facts. The record is large, perfect, and complete. The various links in the chain of evidence are too numerous to warrant any minute attempt to show how they are welded together.

3. The principal contention upon the part of the complainant is that the Wyoming or slate vein and the Ural or contact vein, in their downward course from the surface, unite and form a junction, and that from the point of junction

downward there is but one lode or vein, and that is a contact vein between granite and slate walls. The contention of respondent relative to this question is that there is a middle vein between the 300 and 400 foot levels from the Champion shaft, which is a separate and wholly independent vein, in a different fold of slate from the Wyoming lode, which has its apex within the lines of respondent's claims; that the Wyoming lode or slate vein does not unite with, intersect, or touch the contact vein.

From the impressions received at the trial, and from a careful review and examination of the testimony, as it appears in the record, my conclusion is that the union of the Wyoming and Ural lodes is clearly established by the weight of the evidence as contended for by the complainant. In this connection some general views will be given as to what constitutes a lode or vein. In *Book* v. *Mining Co.*, 58 Fed. 121, I stated that the statute upon this subject "was intended to be liberal and broad enough to apply to any kind of a lode or vein of quartz or other rock bearing mineral, in whatever kind or character of formation the mineral might be found. It should be so construed as to protect locators of mining claims who have discovered rock in place, bearing any of the precious metals named therein, sufficient to justify the locators in expending their time and money in prospecting and developing the ground located." The character of the formation in which the veins and lodes are found in the ground in controversy is entirely different from that which was found to exist in *Book* v. *Mining Co.*, but the quotation therefrom is as applicable to fissure veins as it is to the mineralized zones. In defining lodes and veins the text-books and several of the decisions speak of them as fissures in the earth, filled with quartz in place, carrying gold and silver or other minerals. But true fissure veins and lodes often exist and are continuous without having any filling in certain points or places of mineral matter. A majority of such lodes

have, in addition to the clean fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc. In slate formations, as was said by Prof. Brown in giving his testimony in this case, it frequently occurs that one of the walls has been subjected to a certain amount of fracture, which results in the formation of a number of seams, and in the decomposition of the material included between the seams of unaffected wall rock, which miners designate as "horses." To constitute a vein it is not absolutely necessary that there should be a clean fissure filled with mineral, but it may and does exist when filled in places with other matter. The fissure should, of course, have form and be well defined, with hanging and foot walls. Between these walls will be found bodies of quartz, rich or poor, but there is also liable to be found in many places short or long distances between the quartz bodies or pay chutes, where no quartz will be found in the fissure between the walls. Yet the vein exists, and is often as well defined as if the same was filled with quartz. The clay, the selvages, slickensides, striation, and ribbing of the walls are frequently as strong evidence of the indication of permanency and continuity as the existence of the quartz itself. Under this definition the existence and continuity of the slate and contact veins were proven to exist in length and depth throughout the various underground workings by evidence of a convincing character.

During the trial respondent objected to any testimony being given as to the condition or existence of the lodes upon the surface or in the underground workings in the northern portions of the ground, as only the southern portion was really in dispute. I am of opinion that this testimony was admissible—although, in the light of the former judgment, and of other features in the case, perhaps unnecessary—as bearing more or less directly upon the question of the union of the two veins in the southern part. It was shown that the complainant's witnesses, in tracing the slate vein downward in

the southerly part of the claim, where nearly all of the contests between the parties exist, followed the foot wall of said vein through divers tunnels, inclines, etc., bringing them directly to the contact vein, where, as they testify, there was a distinct union of the lodes, the quartz of the slate vein in some places, that were closely examined, entering and joining with the quartz of the contact vein. This condition of affairs is not only found to exist in the southern part, specially in conflict, by the weight of evidence, but it is shown by undisputed testimony to have existed at several points in the middle and northern portions of the ground where the ore in the veins has been extracted. The established line of croppings extending through the northern, middle, and a portion of the southern part of the ground, running as they do in substantially the same general direction, and descending into the earth at the different angles specified, shows clearly that, if both lodes are continuous, they would naturally come together, because you cannot have two separate lodes of ore or vein matter going into the earth at the angles and in the manner shown to exist here without their coming together, if both are continuous. Then, again, there are two branches or separate lodes or veins of ore—one in slate, the other in contact—above the point of junction, and there is but one vein below that point. Without entering into the field of geological science as to the formation of veins and the filling of the cracks or fissures in the earth, it is evident that all the fissures in the ground in controversy were filled, as Prof. Janin states, at the same period of time, by the same force of nature, whether filled from above or laterally or came up from below. All of these facts tend more or less to sustain and strengthen the positive testimony of complainant's witnesses that there is a union of the two lodes. It will be observed that this conclusion is reached independent of any question as to the extent and effect of the former judgment. It is therefore unnecessary to discuss the question upon which

respondent relied, and in regard to which numerous authorities were cited, whether respondent, by its certificate of purchase from the government, had obtained a subsequently acquired title that could be set up against the judgment. Respondent contends that if it should be established by the evidence, to the satisfaction of the court, that the slate vein unites with the contact, yet it is a union on the strike, and not upon the dip. Upon this question there is also a conflict of evidence, the weight of which establishes the fact to be that the line of the union is irregular. It cannot accurately be said that there is a union on the strike only, or a union on the dip only. The line of union varies at different places. The union at the north and south ends of the ground is found at a greater depth than in the middle part. The fact is that the union is partly on the strike and partly on the dip. The weight of the testimony touching this point establishes the fact that the union is more upon the dip than upon the strike.

The views already expressed are conclusive upon the point that complainant, by virtue of its ownership of the slate vein in the Wyoming, is entitled to an injunction to prevent respondent from working northerly of a line drawn downward vertically with the southerly end line of the Wyoming claim. If no other portion of the ground was in controversy, the decision of the case might be safely rested here without any discussion of the many other questions presented at the trial, because the laws of the United States provide that "where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection." Rev. St. U. S. § 2336. This provision is held not to be in conflict with the provisions of section 2322. *Wilhelm* v. *Silvester* (Cal.), 35 Pac. 997; *Mining Co.* v. *Leach,* (Ariz.), 33 Pac. 418. Complainant would, therefore, take the ground to the full extent stated,—that is, between the end-line bounding planes of the Wyoming claim extended in their downward course,—independent of any rights it

may have by virtue of its patent to the Ural lode and surface location.

4. What are the rights of the complainant under the Ural location and patent? Respondent's counsel claim that no extralateral rights attached to the contact vein, because it crossed the easterly side line of the surface location of the Ural claim before reaching the southerly end line of the location. This point was not seriously urged, but it was intimated and suggested that the opinion of the supreme court in *King* v. *Amy M. Co.*, 152 U. S. 222, 14 Sup. Ct. 510, is susceptible of that construction. If that case is not fairly susceptible of such a construction, then it is, of course, conceded that *Tyler M. Co.* v. *Sweeney*, 4 C. C. A. 329, 54 Fed. 284, and *Last Chance M. Co.* v. *Tyler M. Co.*, 61 Fed. 557, are conclusive in favor of complainant's right to all that portion of the Ural lode the apex of which is within the surface ground of the Ural survey and location. I am of opinion that the decision of the supreme court of the United States is not in conflict with the Tyler Cases decided in the court of appeals for this circuit. It is a universal rule of construction that the decisions of courts are to be interpreted with reference to the facts in each particular case. In the Amy Case the court held that the side lines of the claim constituted the end lines of the location. Why? Because "the lines marked as side lines cross the course of the strike of the vein, and do not run parallel with it." It would be a contortion of the facts and of the law to construe the principles announced in the Amy Case as applicable to a location like the Ural, where the lode, as located by the surface claim, crosses through the northerly end line, and runs nearly parallel with the side lines for a distance of about 1,400 feet, when it changes its course, and crosses the easterly side line of the surface location about 600 feet north of the southerly end line of the location. It cannot, it seems to me, consistently be said that complainant is deprived of any of its extralateral rights to the 1,400 feet,

more or less, which is all entirely within the surface lines of the Ural patent, and substantially parallel with its side lines as marked upon the surface ground. The statute of the United States is not, in my opinion, susceptible of any such construction, and no decision of any national or state court has ever gone to that extent. The supreme court of the United States in the Amy Case simply decided that when a mining claim is located across, instead of along, the lode, its side lines must be treated as its end lines, and its end lines as its side lines; so that, under Rev. St. § 2322, the dip cannot be followed outside the verticle plane of the original side lines into an adjoining claim. There is nothing in either of the opinions of the circuit court of appeals in the Tyler Cases which is at variance with this principle. On the contrary, this rule is expressly recognized. But it is true that there is an expression in the Tyler Cases to the effect that the question whether the lode crosses the side lines more nearly at right angles than along the course of the side lines should always be considered. This particular position, which is deemed sound and just, was not discussed in the Amy Case, and was not, perhaps, involved in that decision. One illustration will be sufficient to show the justice of the position as stated in the Tyler Cases, although that particular question is not here involved: Let us suppose that a location is made under the act of 1872, in the form of a parallelogram 1,500 feet in length and 600 feet in width; that the lode enters one of the side lines within 5 feet of one of the end lines of the location; that it then continues upon its strike, nearly parallel with the side lines, until it comes within 5 feet of the other end line, and then changes its course so as to cross the other side line. This lode does not pass through either end line, yet, under the rule announced in the Tyler Cases, the locator would be entitled to 1,490 feet lengthwise upon the lode, and to follow it for that distance upon its dip vertically downward, as expressed in the statute. I am of opinion that in such cases the statute

is definite enough and clear enough to make the end lines parallel at the point of the entrance and of the departure of the lode across the side lines, and to draw them crosswise of the general course of the lode within the limits of the surface location and that this should always be done so as to give to the locator just what the statute evidently intended he should have, instead of depriving him of all extralateral rights because, by some mistake or oversight in marking his lines, or by lack of judgment or knowledge as to where the lode ran, he had failed to get his lines exactly parallel with the lode, and had marked his end lines at a point beyond where the lode was found to exist upon its strike within the surface lines of his location. But, be that as it may, the Amy Case does not go to the extent of deciding that if the lode passes through one end line, and in its entire course is nearly parallel with the side line, which it crosses before reaching the other end line, the locator would be deprived of all his extralateral rights. In a majority of cases where mining locations are made in the form of a parallelogram under the act of 1872, the lode or vein located does not run lengthwise directly parallel with the side lines of the location. The statute is based upon ideal locations of parallelism that seldom, if ever, exist. It is in fact almost impossible to make a perfect surface location, the side lines of which would be absolutely parallel with the lode, or the end lines precisely at right angles with the strike of the lode, no matter what length of time is taken before marking the surface boundaries of the location. If the locator makes his location crosswise instead of lengthwise of the lode, then the end lines of the location become side lines, and he can only take so much of the lode lengthwise as lies within the surface lines of his location. But if the lode runs like the contact vein does through the Ural surface ground, there is no substantial reason that would justify a court in declaring that the locator would not be entitled to any extralateral rights. No such construction has ever been given to

the statute. There is but little, if any, force in the suggestion often made that the locator should postpone the marking of his boundaries until sufficient explorations are made to ascertain the "true course and direction of the vein." The present case furnishes a fair example of the difficulties so often encountered by the miner in his efforts to determine the direction of the vein he has discovered.

The Wyoming vein has been located, and at different times worked upon, during the past 40 years, and it is still a disputed and closely contested question as to where the lode actually runs; and, in addition to all the regular workings of the mine, it has required the expenditure of money, time, and labor in order to enable the witnesses to testify with any degree of certainty to the "true course and direction of the vein." Every practical miner knows the difficulty that is often experienced in ascertaining these facts. The truth is that the miner is often compelled by the law to make his lines of location upon the surface ground before such facts can be ascertained. There is a limit to the time he can take before marking the boundaries of his claim. He is required to exercise his best judgment from the developments he has been able to make, and he is, of course, confined to his surface location, whether his judgment was right or wrong. The statute should be so construed as to give to the locator what he actually locates; no more and no less. It should be liberally construed in his favor, so as to give him the full benefit of the statute in its true spirit and intent, in order to carry out the wise and beneficent policy of the general government in opening up the mineral lands for exploration and development. When the prospector discovers a vein of ore of sufficient value to justify the expenditure of time, labor, and money to open up and develop the same, he is honestly and legally entitled to the fruits of his labor. He is admonished by the law that he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location,

but he is at the same time assured that he will not be limited or deprived of his extralateral rights as to the depth of such lode, upon its dip, the apex of which is within the surface lines of his location. The statute of 1872 gives to locators of mining claims "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." These are their extralateral rights, which should neither be extended nor restricted by the courts. The only limit placed by the statute is that "their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward, as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges." One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained as defined in the statute.

It may be admitted, as was suggested by counsel in this

case, that it would be an herculean task to endeavor to fathom the complications that are liable to arise in the construction of this statute, and to provide for their solution upon any defined method of interpretation. One thing, however, is certain: that, unless it can be done, then the statute is radically wrong, and the sooner amendments are made thereto to avoid such difficulties, the better it will be for the mining industry of the country. In fact, it is a question worthy of consideration whether it would not be advisable to have the mining laws amended so as to adopt the Spanish, Mexican, and Roman rules, and give to the miners a greater width of ground upon the surface,—making a square location,—and confine the owner of the claim to the ground within the boundary planes of his location in length, width and depth, the same as agricultural land, so as to avoid any further conflict over side and end line propositions that are becoming such fruitful themes of endless dispute and litigation. This is a question, however, that is solely within the province and discretion of congress.

It will be noticed that the end lines of the Ural are not parallel with each other. The location was made under the law of 1866, which did not require parallelism of the end lines. *Walrath* v. *Mining Co.*, 63 Fed. 552, and authorities there cited. It was admitted upon the trial by complainant that the northerly end line of the Ural location was the more easterly instead of westerly part thereof, to wit, the line from C. M. 11, "S. 56, 10 W. 5, 13 Ch." to C. M. Co., No. 4, as shown in the diagram taken from the stipulated map. A line drawn across the Ural location parallel with this northely end line so as to strike the point where the Ural or contact vein crosses the easterly side line of the Ural location would be the southerly end line of the contact vein, and these end lines extended vertically downward would define the rights which complainant is entitled to under its ownership and patent of the Ural lode.

5. What are the rights of complainant, under and by virtue of its patent to the Ural ground, to the southerly part of the Wyoming or slate vein after it crosses the southerly end line of the Wyoming location? Section 2322 of the Revised Statutes, heretofore quoted, gave to the owners of the Ural lode and surface location all other "veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." This portion of the Wyoming lode was not located by complainant. It was the Ural lode for which the patent was obtained, and under the law of 1866 this was the only lode that was granted; but when the act of 1872 was passed it was so framed as to apply to all mining locations theretofore made as well as to all others to be thereafter made, and the complainant is the owner of so much of the slate or Wyoming vein as has its apex within the surface of the Ural location. But here we are met with the difficulty of determining from the evidence how far the apex of this vein is shown in the Ural claim after leaving the south end line of the Wyoming surface location. This is the most difficult and doubtful question of fact that is presented to the court for its determination. The testimony as to the existence of the slate vein to certain points southerly, near the mouth of the Wyoming shaft, may be said to be fairly established by the evidence. South of that point to the southerly end of the Ural it is not well defined, and is not clearly proven. The court is left in doubt as to the truth. The impression received from an examination of the record might be said to be that the probabilities are in favor of that vein extending through the Ural ground, as claimed by complainant. But the court is not prepared to say that the fact of its existence to that extent has been proven to its satisfaction; and this should be clearly shown before the court would be justified in giving to complainant the right to follow underneath within the surface lines of the New Years' and New Year's Extension claims,

belonging to respondent. The respondent has the undoubted right to say to complainant, "Hands off of any and everything within my surface lines extending vertically downward, until you prove that you are working upon and following a vein which has its apex within your surface claim, of which you are the owner!" Judge Hallett, in *Leadville M. Co.* v. *Fitzgerald,* 4 Morr. Min. R. 385, Fed Cas. No. 8,158, expresses the true rule upon this subject as follows:

"Within the lines of each location the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as a part of some lode or vein having its top or apex in other territory. In other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until some one else shall show by a preponderance of testimony that such deposits belong to another lode having its top or apex elsewhere."

See also *Doe* v. *Mining Co.,* 54 Fed. 937; *Duggan* v. *Davey* (Dak.) 26 N. W. 892.

The facts do not show by a preponderance of evidence that the slate vein extends any further south than the southerly end-line plane of the Ural, and, as the slate vein is not clearly shown to pass that line going south, I am of opinion that complainant is not entitled to any further or other rights than have already been given to it by virtue of its patent to the Ural or contact lode. The same result would be reached if the court should accept the doctrine announced in *Patterson* v. *Hitchcock,* 3 Colo. 533, and followed in *Armstrong* v. *Lower,* 6 Colo. 399, that, "if the lode located terminates at any point within the location, or departs at any point from the side lines, the location beyond such point is defeasible, if not void."

6. With reference to complainant's rights there is one novel proposition, seriously and earnestly advanced by complainant's counsel, that demands consideration. It is sub-

stantially to the effect that where the patent conveys a lode, and independently and clearly marks it out, as the land office has a right to do, and did do in this case, then no collateral attack can be made to the patent so as to show that the lode is in another place from that marked out in the patent; and it was argued that there was a distinction, which should be observed and followed by the courts, between a patent where there is no lode distinctly granted by a specific definition, where the courts must naturally inquire as to its existence and extent in order to determine the rights of the parties, and a case where a patent recites the direction and course of the lode. In the latter case it is claimed that, while the government of the United States might inquire as to its truth, no collateral attack could be made upon it by the owners of other mining locations; that the court is absolutely bound to proceed and act upon the theory that the land office ascertained the facts before it granted the patent; that the definition of the Ural is as complete and perfect to all intents and purposes as it is to the surface boundary lines of the ground itself within which it is included, and upon these grounds complainant denies the right of respondent to show that the Ural or contact vein does not run along the dotted line of the patent—as shown in the diagram—clear through the Ural claim, from end to end of the location and survey. The reply to this is that respondent is not assailing the patent in any manner whatever. It does not deny its validity. It admits that complainant has the title to the contact vein, and to every other lode or vein within the limits of the surface location of the Ural claim. It denies, and has the right to deny, that any portion of the Ural lode situate southerly from the point where it crosses the easterly side line of the Ural location has its apex within the Ural claim. The answer heretofore given, that complainant must prove that the vein it claims within the surface lines of another mining company has its apex within the lines of its own claim is directly applicable

to this contention. This court cannot presume that the land office determined the course of the lode. The marking of an ideal line across the survey and diagram did not have the effect of putting a lode into the ground if there was no vein there. The respondent has the right to show what the facts are. Mr. Justice Miller, in answering a somewhat similar contention, in his instructions to the jury in *Stevens* v. *Williams*, 1 McCrary, 480, Fed. Cas. No. 13,413, said:

"The plaintiff has asked certain instructions which I have refused, * * * and I regret that they should have been introduced. * * * I am asked by him to state that the patent which he has received from the United States for the Iron mine is conclusive that the sheet of mineral matter in question is a vein, within the meaning of the statute. I decline to give this instruction. Certainly, outside of the vertical projection of the side lines of the plaintiff's patented ground, if the defendants can show that the mineral matter which is the subject of this controversy is not a vein, they have the right to show it. Outside of the side lines of the plaintiff projected perpendicularly downward defendants have the right, if they can, to show that the vein, or thing which is called a vein, is not a vein."

7. One more question, and the case is disposed of. It is claimed by respondent that under the form of the pleadings in this case the complainant is not entitled to an accounting; that this action is really an ancillary action at law; and that complainant should have divided its case, and gone upon the law side for its damages and upon the equity side for its injunction. Such is the common, and, as I think, the better practice, and more in accordance with the rules of this court. But a vast number of authorities were cited by counsel, the weight of which seems to sustain the right of complainant, under the pleadings, to an accounting as well as to an injunction. Let a decree be drawn in conformity with this opinion for an injunction and for an accounting.

J. A. CARTER v. J. D. THOMPSON ET AL.

(65 Federal 329. U. S. Circuit Court, District of Montana. Nov. 19, 1894.)

Offer of public lands for sale at auction is not a condition precedent to their being patented for a town site.

[1]**Attack on town site patent.** A patent for a town site cannot be attacked by one whose rights, if any, in the land, attached after issue of the patent, on the ground that the land was theretofore known to be mineral land, but it can be assailed only in a direct proceeding by the United States.

Limited right to quiet title. One having a placer mining right, which can only be acquired on public land, can maintain suit to quiet title, if at all, only as to his limited interest.

Suit by J. A. Carter against J. D. Thompson and others to quiet title to mining property. Heard on demurrers to the bill.

J. A. CARTER, for complainant.

[1]It cannot be attacked by a party who purports to acquire his rights after the patent issues. *Peabody Co.* v. *Gold Hill Co.* 111 Fed. 817.

And only the United States can attack the patent where the proceeding is to set it aside—not to declare the patentee a trustee for use of the complainant. *Boggs* v. *Merced Co.* 10 M. R. 334. *Mullan* v. *U. S.* 118 U. S. 271. *U. S.* v. *Iron S. Co.* 128 U. S. 673.

Suit by the Government lies for misconstruction of the Land laws by the Department. *U. S.* v. *Winona Co.* 67 Fed. 948.

The judgments of the land department permitting entries of land and the patents based upon those entries bind all the parties to the proceedings, which resulted in them and all those claiming interests acquired from such parties subsequent to the entries. But they do not estop those who were not, and were not required to be parties to the proceedings from establishing by the customary evidence the truth relative to any fact material to their claims in any litigation between them and the holders under the patents. *Uinta Co.* v. *Creede Co.* 119 Fed. 164.

See exhaustive note on the subject of attack on patents in *Hartman* v. *Warren*, 22 C. C. A. 38, by H. Campbell Black.

TOOLE & WALLACE, SANDERS & SANDERS, MCCONNELL, CLAYBERG & GUNN, MASSENA BULLARD, H. G. MCINTIRE, and GEORGE B. FOOTE, for defendants.

KNOWLES, District Judge. In this case complainant commenced an action to quiet title. He sets forth that he located the premises in his complaint described as a placer mining claim. The manner of making, and the steps taken in making, this location are set forth particularly. There is no doubt, therefore, but the only title he has to said premises is derived from this location. The title of the defendants is also set forth in these words: "For the only claim or interest they or either of them have, in privity with the government of the United States, is asserted by them, and each of them, under and by virtue of a pretended entry of and patent to the Helena town site in said Lewis and Clarke county, a copy of which said patent is hereunto attached, and marked 'Exhibit B,' and made a part hereof." The patent shows a grant of the premises in dispute, with other lands, to one Miers F. Truett, probate judge of Lewis and Clarke county, Mont. T. in trust for the several use and benefit of the occupants of the town site of Helena, according to their respective interests, etc. In the bill there is an allegation that the premises in dispute are mineral land, and known to be such at the time of and prior to the application to enter said land under the town-site law. The location of the claim under which complainant asserts title was made on the 7th day of September, 1893. The town-site patent was issued June 15, 1872. The claim seems to be made that this patent was issued before the land was offered for sale at public auction. Complainant has not noticed the difference between the statute which provides for the pre-emption of public lands, and the one providing for the sale of such lands for town-site purposes, and the statute for the private sale of land. In the case of *Railway Co.* v. *Dunmeyer,* 113 U. S. 629, 5 Sup. Ct.

566, the Supreme Court points out "that sale, pre-emption, and homestead are three different modes of acquiring an interest in public lands." There may be added to this list the acquiring an interest in public lands by the proper officers in trust for town-site purposes. Public lands could be pre-empted or obtained as a homestead or for town-site purposes without the land having been offered for sale at public auction. Public lands could not be acquired at private sale until such an offer was made. So that the authorities cited upon that point have no bearing. It seems to be claimed that, as the lands were known to be mineral before the application or issuing of the patent, therefore it is void. The question as to whether the land was mineral or not was one upon which the land department passed in issuing the patent to Miers F. Truett, the probate judge. In speaking of the functions of the land department in the case of *Steel* v. *Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389, the supreme court said:

"Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its annulment or limitation." In the case of *Davis* v. *Weibbold*, 139 U. S. 525, 11 Sup. Ct. 628, the supreme court, in speaking of the effect of an exception in grants of mineral lands, said, as to the effect of a patent: "The grant or patent, when issued, would thus be held to carry with it the determination of the proper authorities that the land patented was not subject to the exception stated." In the case of *Barden* v. *Railroad Co.*, 154 U. S. 288, 14 Sup. Ct. 1030, the supreme court held that it was within the province of the land department to inquire into the character of lands, when issuing a patent therefor, as to whether it was mineral or not; and, if lands were determined to be non-mineral, this determination would be conclusive, in

the absence of fraud, imposition, or mistake. The court says upon this point: "Their judgment in such cases is, like that of other special tribunals, upon matters within their exclusive jurisdiction, unassailable, except by a direct proceeding for its correction or annulment." The conclusion is that the land granted to Miers F. Truett, in trust for the Helena town site, must be classed as non-mineral. It was so determined by the land department. This determination cannot be attacked in a collateral proceeding. This was so held in the case of *Barden* v. *Railroad Co., supra.* If any fraud was practiced, or any mistake of law or fact occurred, in issuing the patent to Truett to the Helena town site, complainant cannot take advantage of this. He had no rights at that time to be affected by either the fraud or mistake. His rights, if any, accrued, according to his own showing, 21 years after the issuing of such patent. The supreme court has fully decided this matter in the cases of *Vance* v. *Burbank,* 101 U. S. 514; *Bohall* v. *Dilla,* 114 U. S. 47, 5 Sup. Ct. 782. The only way this patent can be set aside or annulled is by a direct proceeding instituted by the United States for some fraud practiced on it, or on account of some mistake of fact or law occurring when the patent was issued. Complainant, therefore, by his own showing presents facts to the court which show that he is not entitled to recover in this case.

There is another point that I have not discussed in this case. The complainant has only a placer mining right. This may be only a license to work the ground located or it may amount to an easement. This I do not decide. Whatever the right is, it can only be acquired in public land, not in land that is already patented. *Davis* v. *Weibbold, supra.* But, admit that complainant has this license or easement, with only such a title can he institute proceedings to annul a patent of the United States to this ground? I think not. I do not think he has sufficient interest in the land to justify

him in maintaining such an action as this. He has only a very limited interest in the land, if any, and only to the extent his interest is interfered with can he maintain a suit to remove a cloud therefrom or to quiet a title thereto. If only a license, as some authorities maintain, he would have no such interest, for he would have no title to be quieted.

The demurrers in this case are sustained and the bill dismissed, at complainant's costs.

GILBERT HOOKS ET AL. v. BARNEY FORST ET AL.

(165 Pennsylvania 238; 30 Atl. 846. Supreme Court. Jan. 7, 1895.)

[1]**Surrender by parol.** Where the lessees under an oil and gas lease have an absolute right to rescind the lease at any time, and such lessees never enter into possession of the demised premises, the rights and privileges under the lease may be surrendered by parol.

Declining to pay further instalments of rent and telling the lessor to go ahead and let it to whoever he pleased and that the lease would be returned although it was never formally redelivered is sufficient proof of surrender.

A tender after rescission will not revive a surrendered lease.

[2]**The holders of an unworked oil lease are not tenants in common** and the acts of two out of three in making surrender of the lease with the knowledge of the third bound them all.

Bound by associate's act. Where, by the terms of an oil lease to three persons jointly, the lessees have the right to surrender the lease by parol, the third is bound by the declarations and acts of the other two respecting such surrender.

Appeal from Court of Common Pleas, Butler county, Aaron L. Hazen, Judge.

Ejectment by Gilbert Hooks, M. Lahey, and W. R. Stoughton against Barney Forst and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

JOHN M. THOMPSON, W. C. THOMPSON, and W. H. LUSK, for appellants.

LEV. MCQUISTION, for appellees.

DEAN, J. Thomas Anderson was the owner of a tract of land containing about 50 acres, in Adams township, Butler county. On the 30th of October, 1889, by writing duly executed, he granted to Campbell, Lahey, and Stoughton the exclusive right to drill and operate for oil and gas on this land. The term was for 15 years, and so long thereafter as

[1]*Double* v. *Union Co.* 172 Pa. 388; 18 M. R. 327.

[2]Compare *Edmonds* v. *Mounsey*, 15 Ind. App. 399; 18 M. R. 384.

oil or gas was produced in paying quantities. In consideration thereof the lessees agreed to give to Anderson one-eighth part of all the oil produced; if gas was found, $200 annually was to be paid for each well; and, further, they were to pay to Anderson $100 per month rent until one well was completed. Anderson reserved the right to the surface for cultivation. The lessees stipulated for the right to surrender the lease at any time, and thus relieve themselves from further obligation, but the payments theretofore made were to be retained by Anderson. The lessees paid $100, the first month's rental, at the execution of the lease, on the 30th of October, 1889, and also a second $100 on the 30th of November following. They made no further payments, nor did they do anything in the way of development. When the third $100 was due, January 1, 1890, the lessees were unable to pay it, and asked Anderson for an extension of time. This, defendants allege, was granted on the condition that, if not paid at the end of three weeks, the lease should be surrendered or rescinded. The money was not paid, and defendants allege that these lessees and Anderson, in pursuance of the understanding before had, mutually agreed to a rescission, and Anderson was verbally authorized by them to lease to others. On the 17th of June, 1891, about 16 months after the alleged rescission, Anderson leased the same premises to defendants, who went into possession for the purpose of boring for oil, and made successful developments. Then plaintiffs brought this ejectment, claiming the exclusive right under their first lease. In the meantime Campbell transferred his interest to Hooks. On the trial there was conflicting evidence as to the fact of rescission, which the court submitted to the jury, who found for defendants. The court afterwards entered judgment on the verdict, and we have this appeal by plaintiffs, the first lessees.

Although there are many assignments of error, the real question on which the case turns is, was there a rescission of

plaintiffs' lease? Anderson had no right to rescind for non-payment of the $100 monthly rental, but he had a right to enforce payment by personal action against the lessees on each monthly default. Unless this were avoided, any right they had would, in a comparatively short time, have been divested. The lessees had the right at any time to surrender the lease, and relieve themselves from liability for the fast recurring monthly payments. In this event, they lost what they had paid, but nothing more. They had paid two monthly installments, and defaulted on the third. Defendants' evidence showed that, at this time, Campbell and Lahey called on Anderson at his barn, and asked for time on the payment then due. It was agreed betwen them that the time should be extended three weeks, and, if the money was not then paid, they would surrender the lease. At the end of that time Lahey told Anderson he could not raise the money; that he (Anderson) should go on and lease to any one, and he would bring the lease back; that he would have delivered it then, but had forgotten it. He told Anderson half a dozen of times to go ahead and lease the land, and that he would fetch the lease back. As to the agreement to surrender, if the money was not paid in three weeks, Anderson is corroborated in all his material statements by four witnesses. Campbell, one of the lessees, on cross-examination, admitted, substantially, the agreement as alleged by defendants. The decided weight of the evidence shows that there was a positive agreement to rescind, if the money was not paid at the end of three weeks. It was not paid, and one of the lessees told Anderson to go on and lease to others. Campbell even admits that he had the lease along for the purpose of giving it to Anderson at one time, but because of some fancied personal insult to himself, did not do so. It was not necessary to a rescission that there should be a formal redelivery or cancellation of the lease. Any course of conduct of the parties clearly evincing an intention to rescind a contract such as this works

a rescission of it. As is said in *M'Kinney* v. *Reader,* 7 Watts, 123: "What is wanting to the rescission of an executory contract is the assent of the parties; and it may be signified by their words or acts. The rescission of a lease by express words is called a 'surrender in fact,' and when by acts so irreconcilable to the continuance of the tenure as to imply the same thing it is called a 'surrender in law.'" This was said of a lease for a term less than three years, and as the lease itself, under the statute of frauds, was not required to be in writing, it may be argued that a rescission of it could be established without any special or formal surrender; but the principle in that case is equally applicable to this. Here it is stipulated that the lessees "shall have the right at any time to surrender up this lease, and be released from all moneys due and conditions unfulfilled." There was no right in the lessor to rescind. There was a right in the lessees to do so at any time. As to them, the continuance of the term was dependent on their will. They did not absolutely covenant to develop the land; they only agreed to bore, or pay $100 per month if they did not, with the option to relieve themselves of this obligation whenever they chose. Such a right or privilege could be surrendered by parol, for the possession up until operations commenced was only constructive. There was no actual possession to surrender on part of lessees; therefore none to be resumed on part of lessor to complete a rescission. They had no vested right in oil and gas under the land until, by the necessary expenditure, they demonstrated their existence. *Oil Co.* v. *Fretts,* 152 Pa. St. 456, 25 Atl. 732. The alleged tender after the rescission, even if it had been proven, would not, if rescission had been consummated, have revived the lessees' right or privilege. On the evidence bearing on a rescission or surrender of the contract, the learned judge of the court below gave full and explicit instructions to the jury, of which the appellants certainly have no right to complain. While he properly said such a right as lessees claimed might be surren-

dered by parol agreement, he also said the evidence to establish such agreement must be clear, precise, and undoubted; that the minds of both parties must have assented to the same thing in the same sense. On this, the main question in the case, there was no error. As to the argument that the declarations and acts of Campbell and Lahey could not affect the right of Stoughton, the other lessee, who was not present, it would be well made if they had been tenants in common of the land. One tenant in common cannot divest the estate of his cotenant by declarations or deed. But these lessees were not tenants in common. They were joint grantees of a right or privilege which had never been exercised, and were bound jointly to perform the covenants of the contract on which the right depended. The obligation was not severable. When Campbell and Lahey secured the extension, they secured it for all. Stoughton had the benefit of it. He never paid, or offered to pay, and never, so far as appears, objected to the acts of the other two. When he makes this objection, he stands here in the attitude of not consenting to the two monthly installments which were paid; not joining in the solicitation for an extension which was granted; not authorizing or consenting to the tender which was alleged to have been made after the rescission; not paying, or offering to pay, to Anderson any one of the 16 monthly rentals due before the commencement of the suit. Starting with the lease to them jointly, down through all the subsequent conduct of the parties, there was ample evidence to warrant the jury in finding that Campbell and Lahey, with the knowledge and consent of Stoughton, acted throughout for all of them; if so, he was bound by their acts. The plaintiffs asked no instruction in the court below on the evidence bearing on this question, although they presented 11 written prayers for instructions to the jury. In the general instructions, however, more than once, the court said to the jury that unless defendants had proven, by evidence clear, precise, and indubitable, that

the lessees had agreed to a surrender or rescission of the contract, the plaintiffs were entitled to a verdict. This was substantially an instruction that, unless all three lessees had agreed to a surrender of the lease, the case was with the plaintiffs. If more specific instructions on the evidence were desired, plaintiff's counsel should have asked for them in the court below. There is nothing of merit in any of the assignments of error. They are all overruled.

The judgment is affirmed and appeal is dismissed.

[1]W. E. BARTLEY ET AL. v. THOMAS W. PHILLIPS.

(165 Pennsylvania 325; 30 Atl. 842. Supreme Court. Jan. 7, 1895.)

[2]**Abandonment is a mixed question of acts and intention** and therefore ordinarily a question for the jury.

Parol evidence is admissible of any agreement between parties as to what should be considered due diligence in the construction of the lease.

[3]**A third party** not in privity with or claiming a second lease from the lessor, cannot prove abandonment by the lessee.

[4]**Two parties to forfeiture.** The clause of forfeiture in an oil lease is for the benefit of the lessor and no act of the lessee can terminate it without the lessor's concurrence—there must be evidence that the lessor had declared the forfeiture.

A non-suit is premature when based on a fact which could not appear except as part of the defendant's evidence.

Appeal from Court of Common Pleas, Butler county; John M. Greer, Judge.

Action of ejectment by W. E. Bartley and others against Thomas W. Phillips and W. V. Hardman to recover possession of premises leased to plaintiffs by J. A. Hartzell for oil purposes. Defendant Hardman filed a disclaimer. From a judgment of compulsory nonsuit, plaintiffs appeal. Reversed.

The lease held by the plaintiffs was for the term of 10 years, from September 8, 1888. By the terms of the contract, the plaintiffs were to commence operations for mining purposes within 30 days from the execution of the lease, and, when work was commenced, it was to be prosecuted with

[1]S. C. on second appeal, 18 M. R. 542.
[2]*Taylor* v. *Middleton*, 15 M. R. 284.
Calhoon v. *Neely*, 201 Pa. 97; 50 Atl. 967.
Marshall v. *Harney Peak Co.* 1 S. Dak. 350; 47 N. W. 290.
Aye v. *Philadelphia Co.* 193 Pa. 451; 20 M. R.—.
[3]*Indianapolis Co.* v. *Kibbey*, 17 M. R. 677.
[4]*Leatherman* v. *Oliver*, 17 M. R. 526.
Jackson v. *O'Hara*, 183 Pa. 233; 19 M. R.—.
Mathews v. *People's Co.* 179 Pa. 165; 18 M. R. 552.

due diligence until completion or abandonment. The plaintiffs commenced operations upon the land within 15 days after the execution of the lease, and drilled a well, finishing it the latter part of October, 1888, at an expense of from $2,500 to $3,000. The well was a failure. The plaintiffs then, in January or February, 1889, took their materials off the property.

T. C. CAMPBELL, LEV. MCQUISTION and W. A. FORQUER, for appellants.

CLARENCE WALKER, JOHN M. THOMPSON and W. C. THOMPSON, for appellee.

MITCHELL, J. Plaintiffs offered in evidence their abstract, whereupon defendants admitted title in Hartzell. Plaintiffs then proved the lease by Hartzell to them, their entry under it, and the putting down of one well. They thus made out a complete prima facie case, which called on defendants to show a better title. But it is said, and the court below appears to have adopted this view, that plaintiffs went further, and gave evidence of an abandonment of their possession. This, however, will not support a compulsory nonsuit. Abandonment is a mixed question of acts and intention, and therefore is ordinarily for the jury, and there is nothing in this case to take it out of the rule, for the abandonment was denied in plaintiffs' abstract, and was therefore incumbent on defendants to prove before they could avail themselves of it. Whether the evidence on the part of plaintiffs showed an abandonment by them did not depend exclusively on the length of time that operations had ceased, but also on the intention, and that again was largely dependent on the agreement and understanding of the parties. The plaintiffs denied the intention, and the court, therefore, could not declare the abandonment as a matter of law, but should have left it as a fact to the jury.

The plaintiffs further offered evidence by Burton and Hartzell to show the agreement of the parties as to due diligence and abandonment. This should have been admitted. It was not in any sense an attempt to modify or alter a written contract. The lease provided that the work, when commenced, should "be prosecuted with due diligence until completion or abandonment;" but what should constitute due diligence was a question of fact, on which the parties might agree, either at the time or afterwards, and, if they did, then neither court nor jury had any right to adopt a different standard. If due diligence had been defined in the writing, no pretense of such right could have been set up. But parol proof of the understanding and agreement of both parties was just as effective as a writing, for it went not to a construction of the paper, but to the definition of a fact referred to. Whether any such understanding not expressed in the paper would affect others, subsequently acquiring rights from one of the parties, without notice, we need not consider, for there is no evidence that any such others are before us. The case was not allowed to get that far.

But the nonsuit was erroneous for another reason. Even if there had been a want of due diligence and an abandonment by plaintiffs, no one could take advantage of it but the lessor or one succeeding to his rights, and there was no such party yet in the case. So far as the evidence showed, defendants had neither Hartzell's title nor any other beyond that of mere squatters. As against them, plaintiffs, as already shown, had made out a prima facie case. The error of the appellees, and apparently of the court below, was in regarding the estate of plaintiffs under the lease as terminated ipso facto by the failure in diligence or the abandonment. But it required the act of the lessor. Repeated decisions of this court, from *Wills* v. *Gas Co.*, 130 Pa. St. 222, 18 Atl. 721, to *Cochran* v. *Pew*, 159 Pa. St. 184, 28 Atl. 219, have established that the clause of forfeiture or termination of the estate

is for his benefit, and no act of the lessee can produce that result without his concurrence. Still less can any action of a stranger enforce it. As against any but the grantor, an abandonment is not complete until the statutory period of limitations, or the end of the term granted, and possession may be resumed by the grantee at any time previous. There is nothing in the cases cited—*Munroe* v. *Armstrong,* 96 Pa. St. 307, and *Oil Co.* v. *Fretts,* 152 Pa. St. 451, 25 Atl. 732—in conflict with these views. In the former the lessor had expressly declared the forfeiture, and made a new lease to the plaintiff; and in the latter he had asserted it by implication by a new lease to parties who defended under his title. But it is said that appellees here defend under Hartzell's title, and that their abstract shows the fact. The abstract, however, was not in evidence, as it should have been if relied on for affirmative proof. The practice in the analogous case of statements and affidavits of defense which, under rule of court, are to be taken as admissions of all material facts not denied therein, is shown in *Neely* v. *Bair,* 144 Pa. St. 250, 22 Atl. 673. The respective abstracts of title in ejectment filed by the parties under the rule of court in the present case stand upon the same basis, having the same object, as stated by the present chief justice in *Neely* v. *Bair,*—to narrow the trial down to material matters which are really disputed. The defendants may be in possession under Hartzell's title, and the case therefore analogous to *Oil Co.* v. *Fretts,* but it has not yet been shown to be so. The issue was determined prematurely.

Judgment reversed, and procedendo awarded.

ABRAHAM L. LYNCH v. VERSAILLES FUEL GAS CO.

(165 Pennsylvania 518; 30 Atl. 984. Supreme Court. Jan. 7, 1895.)

[1]**Equitable relief against forfeiture. Time.** Where time is not stipulated as essential and a forfeiture for nonpayment of money, or other matter that admits of accurate and full compensation, is provided as a mere penalty whose object is to enforce performance of another and principal obligation, equity will relieve against it, and will not permit it to be used for a different and inequitable purpose.

[2]**Where an oil lease is operated steadily** and rent paid from year to year a few days inadvertent delay to pay the rent will not sustain a forfeiture.

Where equity would have relieved against forfeiture, in an action at law the verdict should be against forfeiture.

A lessor waives his forfeiture when after pay day he allows his lessee to make, to his knowledge and under his observation, considerable expenditures.

Appeal from Court of Common Pleas, Allegheny county.

Action of ejectment by Abraham L. Lynch against the Versailles Fuel Gas Company. From a judgment for plaintiff, defendant appeals. Reversed.

Plaintiff's ancestor, John Lynch, executed to T. J. Vandergrift a lease of certain land for the purpose of drilling and operating for petroleum and gas. The lease was afterwards, by successive assignments, vested in defendant. It required

[1] *South Penn Co.* v. *Edgell*, 48 W. Va. 348; 37 S. E. 396.

[2] *Edwards* v. *Iola Co.* 65 Kans. 362; 69 Pac. 350.

After forfeiture accrued, if the lessor condone and indulge, he cannot afterwards arbitrarily declare forfeiture. *Hukill* v. *Myers*, 36 W. Va. 639; 15 S. E. 151.

A right to insist on forfeiture for failure to sink an oil well is waived by acquiescence in a failure to sink two or three other wells which were to have been sunk before. *Duffield* v. *Hue*, 17 M. R. 253.

A party cannot enforce a forfeiture where he is himself in default. Forfeiture strictly construed. *Ingram* v. *Golden Co.* 25 Wash. 318; 65 Pac. 549.

the lessee to complete a well within a year, or pay for such delay a yearly rental of $160, and provided that a failure to complete such well or make such payment should render the lease null and void. Defendant paid the rent for several years, and made no effort to get gas. About 50 days before another year's rent fell due, it began drilling, and obtained gas in paying quantity 10 days after the rent was due. It failed to pay the rent when due, and 6 or 7 days afterwards plaintiff gave it notice of his election to declare a forfeiture, without having made demand for the rent. This action was brought to recover possession.

Defendant's third point was as follows:

"3. The lessor having stood by and permitted work to be done upon the well, involving the expenditure of quite an amount of money, from the last day of the year until the 27th of August, when notice of his election to claim forfeiture was given, waived his right of forfeiture, and the verdict must be for the defendant." Refused.

EDWIN W. SMITH and KNOX & REED, for appellant.

JOHN D. SHAFER and T. C. JONES, for appellee.

MITCHELL, J. There is a wide distinction even in equity between forfeitures for failure of punctual payment of money where time is of the essence of the contract and where it is not. If parties choose to stipulate for matters as essential, it is not for courts to say they are not so; but, in the absence of a clear agreement for materiality, courts will look into the nature of the transaction, and be governed by the real bearing of the facts upon the intentions and rights of the parties. Hence it is a settled general rule that where time is not stipulated as essential, and a forfeiture for nonpayment of money, or other matter that admits of accurate and full compensation, is provided as a mere penalty, whose object is to enforce

performance of another and principal obligation, equity will relieve against it, and will not permit it to be used for a different and inequitable purpose. Story, Eq. Jur. § 1316. In the present case time is not of the essence, for, although the nature of oil and gas territory, and of contracts affecting them, is such that, in general, time is essential, yet in the lease in question there is a stipulated rent payable for delay in putting down a well, and no date is expressed for the payment of such rent, it being left to fall due by operation of law at the close of each year. The main purpose of the lease was to have the land tested and developed, and to secure for the lessor the profits of such development. It was his interest, therefore, to have a producing gas well, for it would immediately nearly double his rental. The appellant paid the rent for several years, postponing the effort to get gas, for reasons not appearing, but of which no complaint was made, until July, 1892. It then began drilling, and prosecuted the work in good faith, at a large expense, until it produced gas in paying quantity about the end of August. This, as already said, was in plaintiff's interest. He lived on the premises, and saw the daily progress of the work. On August 20th, when the well was near completion, a year's rent fell due, and payment was overlooked by the lessee. On August 26th plaintiff told the contractor to take away his machinery, and on the next day gave formal notice of his election to enforce a forfeiture. Under the circumstances, he could not equitably do so without notice. There was some evidence that in previous years the rent had not been paid or demanded on the precise day, but it was not strong enough to establish a usage between the parties, and therefore a ground of relief, though it adds something to the equity of appellant's case. But, if plaintiff intended to insist on punctuality of payment, he was bound to ascertain on the very day whether the rent had been paid or not, and to give notice promptly. A delay of six or seven days, it is true, would not ordinarily be conclusive,

and perhaps not even material; but in this case the appellant was in that interval expending on its well, in good faith, and relying on its lease, a sum equal to nearly three years' rent per acre, or a year and a half's rent under a producing well. While making this expenditure, under the circumstances, the appellant was entitled to prompt notice, and the plaintiff was bound to observe and act upon that right. It was said by our Brother Williams, in *Thompson* v. *Christie,* 138 Pa. St. 230, 249, 20 Atl. 934, that the party entitled to enforce a forfeiture of this kind must exercise his right promptly, and the result must not be unconscionable. In the present case the action of the plaintiff was neither prompt nor conscionable. As it is quite clear upon the undisputed facts that a court of equity would have enjoined this forfeiture, the judge should have directed the jury as requested in defendant's third point.

Judgment reversed.

FRANK KUNKLE v. PEOPLES NATURAL GAS CO.

(165 Pennsylvania 133; 30 Atl. 719. Supreme Court. Jan. 7, 1895.)

[1]**Wife's non-joinder in lease.** Where the husband signed a lease and it afterwards appearing that the wife had an interest in the land and the non-procurement of her signature to the lease was the lessee's fault, her outstanding interest is no defense to a suit by the husband for the money.

Facts of the case. In an oil and gas lease, granting the lessee the exclusive right to take oil and gas from the land for ten years, the lessee covenanted to sink a well within six months, or pay the lessor $500, and also to pay $130 yearly rent until the well was sunk; the right to occupy the land being reserved in the lessor. At the end of the six months the lessor demanded the $630, the lessee having done nothing to develop the land, and at the time told the lessee that his wife owned an interest in the land. The lessee refused to pay the rent, and insisted on retaining the lease until the wife signed it, but never offered it to her for her signature. The wife made no objections to the lease. The lessee then offered to surrender the lease on condition that the lessor release him from all claims, and, on his refusal to do so, retained the lease for a year before surrendering it. *Held*, that the fact that the lessor did not have the sole title was no defense in an action by him for the $630.

Appeal from Court of Common Pleas, Westmoreland county; Lucien W. Doty, Judge.

Action by Frank Kunkle against the People's Natural Gas Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. S. MILLER, for appellant.

EDWARD E. ROBBINS and JOHN E. KUNKLE, for appellee.

[1]Mining claims are community property in Idaho, although wife absent. *Jacobson* v. *Bunker Hill Co.* (Idaho) 28 Pac. 396.

Married woman bound by estoppel same as man. *Williamson* v. *Jones* 43 W. Va. 562; 19 M. R.—

Wife must sign oil lease in Texas. *Southern Co.* v. *Colquitt*, (Tex. Civ. App.) 69 S. W. 169.

DEAN, J. This action was assumpsit for rental on a lease of the gas and oil on a tract of 130 acres of land in Washington township, Westmoreland county. The term was 10 years. The consideration was one-sixth of the oil, and $500 annually for each paying gas well. The defendant covenanted to commence operations within six months from the execution of the lease, and complete one well, or pay to plaintiff the sum of $500, and further agreed to pay $130 as rental until the completion of the first well. The right to occupancy of the land for cultivation was reserved by plaintiff. The lease was to take effect at the date of it, which was the 20th of September, 1889. On that day it was delivered to defendant, and remained in its possession until after suit brought,—a period of more than one year and nine months. The grant was for the "exclusive right to drill, bore, excavate, and produce" oil and gas on the 130 acres of land; defendant to hold the right for the period of ten years for that purpose; one well to be completed every year, until four wells were drilled; if not drilled, the royalty ($500) to be paid the same as if drilled. The defendant did nothing in the way of development the first six months, which expired the 20th of March, 1890. About the 2d of April, 1890, the plaintiff went to the office of defendant in Pittsburgh, and demanded the rental and royalty then due,—$630. There was a dispute as to the amount actually due at that time, the plaintiff claiming that the agent of the company, when the lease was delivered, had promised him a bonus of $260, one-half to be paid in two or three weeks, which had not been done. Mr. Pew, the president of the company, refused to pay this; and, while not denying the liability of the company for the $630 stipulated for in the lease, did not pay or offer to pay any part of it. Before this interview closed, Kunkle made known the fact that his wife had an interest in the land. The defendant then demanded that the wife sign the lease. To this Kunkle assented, and the president of the company promised to send

the lease out to their home by an agent, that the wife might also join. This promise he did not keep. The wife was present at the negotiations, which resulted in the execution of the original lease, and, so far as appears, concurred in the contract made by her husband; and there is no evidence that she then or afterwards made any objection. The president, however, insisted on retaining in possession of the company the lease until the wife joined in it. On the 19th of April, following this interview, the company wrote to Kunkle, offering to surrender the lease if he would execute to it a written release and discharge of all rights to rent or royalty. This he refused to do, and the company, as before noted, retained the lease until after the commencement of this suit, when it unconditionally surrendered it.

The complaint of appellant is that the contract signed by Kunkle implied a covenant of title to the entire estate in the land, and, as the evidence showed a fractional interest in his wife, the covenant was broken as soon as made, and therefore there could be no recovery by plaintiff. It will be noticed the grant was for the exclusive right to drill, bore, excavate, and produce for a period of ten years. Whether the apparent approval by the wife during the negotiations and agreement on terms in her presence, and her silence for more than six months after the delivery of the lease, would, in equity, estop her from asserting a right antagonistic to it, it is not material to inquire. She never did object. The defendant had no knowledge of her interest until its obligation to pay was fixed by the lapse of the stipulated six months. On knowledge of her interest defendant did not at once surrender but held on to the lease. During that time it had the right to do either of two things: First, sink one well; or, second, do nothing, and pay $630. In either event, its exclusive right as against the plaintiff remained. He could not grant an exclusive right to another, for he had, so far as he could do so, already granted it to defendants; nor could his wife grant such right,

for the husband, in the face of his contract with defendant, could not join her. The defendant, by its contract with the husband, had tied up the property for development for ten years. It might not choose to sink a single well, but then it must pay. It had leased many of the surrounding properties, and was engaged in developing some of them. It evidently, as was its reasonable right, intended no other, by operations on this 130 acres, should reap the fruits of its expenditure in prospecting on adjoining lands. By this contract, it enjoyed to the full one of the benefits stipulated for. It had one of the kinds of possession intended by both parties. It was not molested in any way. If it had attempted development, and the wife, by legal proceedings or otherwise, had attempted to obstruct it, or even if she had given notice of an adverse claim, which might have deterred the company from an attempt to exercise its right, it would have some standing in equity to resist payment of the first six months. But as, so far as appears, she concurred in the contract, and defendant had the full enjoyment of every right under the contract it chose to assert, it cannot set up an after-discovered fact to relieve it from payment for a benefit it had already received. It must be borne in mind that there was no obstacle to the full enjoyment of the ten-years term. The president of the company, when the husband informed him of his wife's interest, demanded that she also sign the contract. To this the husband assented, and it was agreed the agent of the company would take the instrument to plaintiff's house, that the wife might sign it. This was not done. The defendant was not willing to even trust the husband with the possession of the paper for that purpose. It retained the lease for more than a year afterwards; asserted its right under it, after full knowledge of the wife's interest, by demanding a release in full of all indetbedness before surrendering it,—that is, after the full enjoyment of the right for six months, defendant questions the landlord's title when called upon for rent.

If defendant had actually commenced operations on the land within six months, and taken from it gas or oil, equity, on its complaint of peril to its rights from the wife's outstanding interest, would probably have decreed that she join formally in the grant before payment of royalty and rent. But the enforcement of such an equity was not asked at this trial. As the case was presented in the court below, the company, after enjoyment of the contract for six months, was not ready to pay. It then learned of the wife's interest, and based its refusal to pay on that ground. When the plaintiff was willing to have the contract technically perfected by the wife's signature, it changed its ground, and offered to surrender, on condition that a full release from all indebtedness be executed and delivered; then, after suit brought, made an unconditional surrender of the lease. Not a single authority cited by appellant rules the case in its favor on such a state of facts. All of them are cases where the lessee had been deterred from taking possession by fear of the adverse claim, or where he had been induced to accept the lease by fraud or trick practiced by the lessor. Here the lessee had that sort of possession under its contract it was entitled to. There was not the semblance of fraud perpetrated or intended. The learned judge of the court below rightly held that, as to the rent and royalty payable at the expiration of the first six months, there was no sufficient defense in law or equity.

The assignments of error are overruled, and the judgment is affirmed.

WOODWARD ET AL. v. MITCHELL ET AL.

(140 Indiana 406; 39 N. E. 437. Supreme Court. Jan. 8, 1895.)

Effect of findings on overruled demurrers. Errors in overruling demurrers to pleadings, if there be a special finding or special verdict, may be cured by a proper statement or declaration of the law upon the facts found, but errors in sustaining demurrers cannot thus be cured.

Finding beyond the pleadings. If a fact is embraced in the special finding which is not embraced in the pleadings, it cannot be considered in rendering judgment.

Parol testimony cannot be received to change or vary, take away from or add to, a written contract in the absence of fraud or mistake.

Failure to begin work is an abandonment the same as ceasing to operate after operations begun.

Abandoned lease a cloud on title. Lessors have the right to set aside by bill to quiet title an outstanding lease which has been in fact abandoned.

The action to quiet title under modern practice takes the place of what was known in Chancery pleading as a bill of peace.

[1]**Working other oil wells in the vicinity** and difficulties occasioned by want of railroad facilities are no excuse for failure to comply with express covenant to begin work within a specified time.

---

[1]*Gird* v. *California Oil Co.* 60 Fed. 531; 18 M. R. 45.

Facts held sufficient to prove lessor's assent to abandon. *May* v. *Hazelwood Co.* 152 Pa. 518; 25 Atl. 564. Construction of clause allowing lessee to abandon. *Van Meter* v. *Chicago Co.* 88 Iowa 92; 55 N. W. 106.

A lessee who quits, but resumes, does not abandon. Allowing expenditure after breach of covenant known, amounts to waiver. *Benavides* v. *Hunt,* 79 Tex. 383; 15 S. W. 396.

Change of use of water is not abandonment of the original appropriation. *Schwab* v. *Beam,* 86 Fed. 41.

Non-user of ditch is evidence towards proving abandonment. *Integral Co.* v. *Altoona Co.* 75 Fed. 379. But delay to use may be explained. *Moss* v. *Rose,* 27 Ore. 595; 41 Pac. 666. *Welsh* v. *Garrett,* (Idaho) 51 Pac. 405; 19 M. R.—. *Hector Co.* v. *Valley Co.* 28 Colo. 315; 64 Pac. 205.

Right of lessee to abandon when not bound by specific covenant. *Glasgow* v. *Chartiers Co.* 17 M. R. 523.

Cesser of work because ore not salable is not abandonment. *Hosford* v. *Metcalf,* 113 Iowa 240; 84 N. W. 1054.

Sufficient pleading and finding on issue of abandonment. *Contreras* v. *Merck,* 131 Cal. 211; 63 Pac. 336. Must be specially pleaded. *Hector Co.* v. *Valley Co.* 28 Colo. 315; 64 Pac. 205.

From the Morgan Circuit Court.

A. M. CUNNING, H. C. DUNCAN and I. C. BATMAN, for appellants.

J. H. LOUDEN and W. P. ROGERS, for appellees.

McCABE, J. The appellees sued the appellants in the Monroe circuit court to avoid a lease of certain real estate in Monroe county. Issues were formed upon the complaint in that court, wherein a trial thereof resulted in a special finding of the facts by the court, upon which it stated conclusions of law in favor of appellants who had judgment accordingly. Appellees moved the court to set aside the judgment and grant a new trial as of right under the statute, which motion the court sustained, set aside the judgment and granted the appellees a new trial as a matter of right.

The venue was changed to the Morgan circuit court, where a trial resulted in another special finding of the facts, whereon that court stated its conclusions of law in favor of the appellees, and they had judgment accordingly.

It is assigned for error that the Monroe circuit court erred in overruling the demurrers to the first and second paragraphs of the complaint in granting appellees a new trial as of right, and that the Morgan circuit court erred in its conclusions of law.

It has been frequently decided by this court that errors in overruling demurrers to pleadings, where there is a special finding or a special verdict, are not material, as a correct statement or declaration of the law upon the facts found would correct the error if any there had been committed in the rulings upon the demurrers. For this reason we do not consider the sufficiency of the different paragraphs of the complaint.

This rule does not apply where the demurrer has been sustained, because in that case the facts stated in the pleading

demurréd to cannot get into the finding or verdict legitimately. And if facts not alleged in the pleading are stated in the finding they cannot be considered in rendering the judgment thereon.

It is earnestly contended by the appellants that the Monroe circuit court erred in granting a new trial as of right. The theory on which that court granted the motion was that the action was one to quiet title. The appellee's counsel contend that such is not the nature of the action, or, if the complaint embraces a cause of action to quiet title, it also embraces another cause of action, namely; an action to cancel and forfeit a lease, and that as the statute does not allow a new trial as of right in the latter sort of action the court could not rightfully grant a new trial as of right as to any part of the case.

The substance of the complaint is that the appellees, on April 25, 1888, were the owners and in possession of the N. W. ¼ E. ½ of N. E. ¼ section 5, town. 7 range 1 west, and that on that day they executed to John B. Crafton, William R. Woodward and Samuel M. Mathers a lease on the same for the sole purpose of mining, and removing therefrom, coal, stone, gas, water, oil, minerals and metals. A copy of said lease is made a part of the complaint by insertion into the body of the complaint, and reads as follows, to wit:

"This agreement and indenture, made and entered into this the 25th day of April, 1888, by and between J. M. Mitchell and Judy Mitchell, parties of the first part, and as lessors herein, and John B. Crafton, Samuel M. Mathers and W. R. Woodward, parties of the second part, as the lessees herein, witnesseth that the said parties of the first part, for and in consideration of $1 in hand paid, and the agreements, covenants, rents and royalties hereinafter made and provided for, do by these presents hereby demise, lease and let unto said parties of the second part, for the sole purpose of mining and removing coal, stone, gas, water, oil, mineral and metals of every kind thereunder, the following tract * * * of land situate in Monroe county, in the state of Indiana, to wit. The N. W. ¼ of E. ½ of N. E. ¼ of sect. 5, town. 7 N., R. 1 west, containing 20 acres.

"The terms of this lease and the estate herein granted shall begin on the 25th day of April, 1888, and shall continue for 20 years, provided said enterprise shall be abandoned 12 months, then said lease shall be null and

void; and said lessees further covenant and agree to pay said lessor one-tenth part of the net profits arising from such operations.

"It is further agreed by the parties hereto that the lessees aforesaid shall have the right to enter upon said premises at any time for the purpose of prospecting and selecting a location for opening mines or wells, and for that purpose shall have the right to take therefrom coal, stone, minerals, gas, water, oils or metals for the purpose of testing the same.

"It is further agreed that all the covenants, stipulations, and remedies contained and provided for in this instrument, shall run with and follow this lease and the estate granted, and shall apply to, vest in and operate upon the heirs, representatives and assigns and grantees of the parties hereto.

"It is further agreed that in case of the termination of this lease, either by expiration or forfeiture, said lessees shall have the right to remove all buildings, machinery, tracks and fixtures which they have put or caused to be put upon said premises: Provided, That they shall first pay said lessor the money which they may owe to said lessor under this lease, and said lessees shall not be held liable for any damages for opening stone quarries, sinking wells or other work done in pursuance of this lease, and the payment of the lessors of the said one tenth part of the net profits arising from the operations of quarries and wells shall be in full of all demands under this lease.

"In witness, etc. Signed,

"J. M. Mitchell,
"Judy Mitchell,
"John B. Crafton,
"Samuel M. Mathers,
"W. R. Woodward."

Then follows an acknowledgment of the execution of the lease before Lewis N. Williams, a notary public.

That by the terms of said lease the same was to continue 20 years provided that if said enterprise shall be abandoned for 12 months, then said lease shall be null and void: That said lease was duly recorded in the recorder's office of Monroe county on the day of its execution; that on the ——— day of ———, 1888, Samuel M. Mathers sold and assigned his interest in said lease to John B. Crafton, and said defendant Adams purchased some interest therein; that two years and nine months have elapsed since said lease was executed, and as yet said defendants have done no mining or anything else on said real estate, but have entirely abandoned said en-

terprise, and, by the terms of said lease, the same is null and void; that said plaintiffs notified said defendants, on the 7th day of February, 1891, that plaintiffs claimed that said lease and contract was null and void by virtue of the terms thereof, and asked said defendants to release the same on the record in said office of said recorder, which said defendants refused to do, and still refuse to do so, and the same remains of record unsatisfied, and is a cloud upon the plaintiff's title to said real estate. Wherefore, etc.

The second paragraph is in all respects similar to the first, the substance of which is set forth above, except in the second it is alleged as to the forfeiture clause that "Said parties to said lease agreed, and such was the understanding and agreement by and between said parties that, in the event work was not commenced on the land within 12 months from the 25th day of April, 1888, or if commenced was subsequently abandoned for a period of 12 months, then said lease was to be null and void."

It is contended that these allegations amount to an attempt to change and vary the terms of a written contract by allegation and proof of oral contemporaneous stipulations and understandings inconsistent with the terms of the written contract. No principle is more firmly settled than that such testimony cannot be received to change or vary, take from or add to a written contract in the absence of fraud or mistake. *Cole* v. *Gray*, 139 Ind. 396, and authorities there cited.

Counsel's contention is that the enterprise could not be abandoned unless it had been begun. They insist that the meaning of the contract is that the lease continues to subsist for the full term of twenty years, though not a single thing is done under it on the land, and even though no intention exists on the part of the lessees to do anything under the terms thereof. We think it quite clear that such was not the intent of the parties as gathered from the lease itself. No reason is perceived why it would not be as injurious to the lessors to fail to commence operating the mines and quarries for 12

months, as to cease operating them after beginning, for a period of 12 months. We think it was clearly contemplated by the parties that a mining and quarrying enterprise was entered upon by the execution and acceptance of the lease, and if nothing more was done within 12 months after its execution, it would be an abandonment of the enterprise for 12 months within the meaning of the contract. And therefore, the lessors, on such failure or abandonment, had a right to have the apparent incumbrance on their title judicially decreed void.

In *Ragsdale* v. *Mitchell,* 97 Ind. 458 (461), it was said: "The action to quiet title, provided by the statute, is an extension of the equity doctrine, which settled titles under a proceeding called a bill of peace. *Curtis* v. *Suteer,* 15 Cal. 259; *Green* v. *Glynn,* 71 Ind. 336.

"Under the equity rule, a bill of peace would lie only where the complainant was in possession; but under the statute an action may be maintained by an owner whether in or out of possession. The object of the action given by the statute is substantially the same as that of a bill of peace, namely, to settle the title of the plaintiff and clear it from all claims of the defendant. * * * An action to quiet title does not merely settle title so far as to invest the plaintiff with possession. It does much more than this when successfully prosecuted; it sweeps away all claims and liens which impair the complainant's title. * * * The effect of a decree in an action to quiet title is to free the land from all claims of the defendant, and it is a conclusive adjudication upon all conflicting claims to the land." Citing *Green* v. *Glynn, supra; Hays* v. *Carr,* 83 Ind. 275; *Ulrich* v. *Drischell,* 88 Ind. 354; *Cooter* v. *Barton,* 89 Ind. 185; *Stumph* v. *Reger,* 92 Ind. 286.

Had the complaint in this case been in the ordinary form, alleging in general terms that the complainants were the owners in fee simple of the land in controversy, describing it, and alleging that the appellants claimed some interest therein, which claim was unfounded, with a prayer that their title be

quieted, no one can deny that, on proof of the facts specifically alleged in the complaint as it now stands, a decree quieting their title would have been fully justified. Therefore, it follows that the action was one to quiet title because it is always the facts which are alleged that give character to the action and not what the parties may see fit to call it in the pleading. *Searle* v. *Whipperman,* 79 Ind. 424; *Johnson* v. *Hosford,* 110 Ind. 572; *Houck* v. *Graham,* 106 Ind. 195; *Louisville R. W. Co.* v. *Thompson,* 107 Ind. 442; *Henry* v. *Stevens,* 108 Ind. 281.

Nor do we think there were two causes of action embraced in the complaint. It contained but one cause of action, and that was one to quiet title.

The special finding in the Morgan circuit court is, in substance, that the facts alleged in the complaint are true. The other facts found therein that the appellants had taken other leases on other land in the vicinity of the same character, and to the effect that they were working those leases and were approaching these lands as fast as they could, and that they could not work these lands for want of railroad facilities, constituted no excuse for their failure to work them within 12 months, in accordance with the terms of their contract.

The conclusions of law in the Morgan circuit court are to the effect that the law is with the appellees and that they are entitled to recover in the action; that the contract and lease in suit are null and void and should be canceled and satisfied, and appellees' title in and to the land in suit should be quieted in them and appellants and each of them should be enjoined from setting up or asserting any claim to or upon said land by reason of said contract or lease.

It follows from what we have said, that the Monroe circuit court did not err in granting a new trial as a matter of right, and that the Morgan circuit court did not err in its conclusions of law.

The judgment is, therefore, affirmed.

JORDAN, J. took no part in the decision of this cause.

SAMUEL MATHER ET AL. v. RICHARD RILLSTON.

(156 U. S. 391; 15 Sup. Ct. Rep. 464. Supreme Court. March 4, 1895.)

Neglect of precautions. In all occupations attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and the neglect to provide such readily attainable appliances is proof of culpable negligence.

Neglect to warn employees. If laborers engaged in hazardous occupations are not informed of the accompanying dangers by their employers, and they remain in ignorance of the dangers, and suffer in consequence, the employers are chargeable for the injuries sustained.

Careless storage of dynamite. Plaintiff was employed by defendants in handling dynamite and fulminating caps, kept in an engine house, where they were in continuous danger of explosion from great heat and constant jarring and their confused and disorderly position; but defendants did nothing to lessen the heat or jarring, nor did they inform plaintiff of the danger incurred in handling the dynamite and caps or of the danger of explosion from heat or concussion, although he was ignorant thereof. *Held*, that defendants were guilty of negligence and therefore liable for injuries to plaintiff from an explosion of the caps and dynamite. 44 Fed. 743, affirmed.

No contributory negligence. Under such circumstances, plaintiff, having no knowledge of the special dangers attending his work, and not being informed thereof by defendants, could not be charged with contributory negligence.

Loss of both eyes. Plaintiff, 24 years of age, employed in handling dynamite, was injured by an explosion of dynamite, which destroyed his eyes, and inflicted other severe injuries, whereby he was deprived of all means of earning a livelihood. *Held*, that a verdict for $10,000 was a moderate compensation.

Venue in Negligence Cases. Action allowed in California on accident occurring in foreign country. *Roberts* v. *Dunsmuir*, 75 Cal. 203; 16 Pac. 782.

Instance of suit in New York, accident in Pennsylvania: Case governed by Pennsylvania Law. *Szotak* v. *Berwind-White Co.* 72 N. Y. S. 647.

Pleading. Instructions. Evidence. Evidence of want of experience of plaintiff admitted in rebuttal for special purpose though not pleaded as an element of the negligence. *Held*, that evidence so ad-

In error to the Circuit Court of the United States for the western district of Michigan.

This was an action to recover damages for injuries sustained by the plaintiff from an explosion in an iron mine at Ironwood, in Michigan, alleged to have been caused through the carelessness and negligence of the defendants. It was commenced in the circuit court for one of the counties of that state, and, on motion of the defendants, was removed to the circuit court of the United States for the western district of Michigan. The declaration sets forth that the defendants were, in May, 1888, and had been for some time previously, operating at Bessemer, in the county mentioned, an iron mine, called the "Colby Mine." It then describes the general nature and mode of their mining, the use by them of giant powder or dynamite, of great explosive power, in blasting rock, bowlders, and ore, the manner of its use, and the dangers attending it from explosion, to which it is liable from

mitted must be limited by instruction to its special office. *Neilson* v. *Nebo Co.* (Utah) 69 Pac. 289.

Both theories of plaintiff and defendant as to negligence must be submitted. *Cerrillos Co.* v. *Deserant*, 9 New Mex. 49; 49 Pac. 807. *Reese* v. *Morgan Co.* 15 Utah 453; 49 Pac. 824.

General allegation of want of care of machinery. *Held* good after verdict. *Mangum* v. *Bullion Beck Co.* 15 Utah 534; 50 Pac. 834.

Defendant's knowledge and plaintiff's want of knowledge of danger must both be alleged in complaint. *Peerless Co.* v. *Wray*, 143 Ind. 574; 42 N. E. 927.

Declaration need not anticipate defense of contributory negligence. *Cons. Coal Co.* v. *Wombacher*, 134 Ill. 57; 24 N. E. 627.

General consideration of the essentials of the complaint in actions based on negligence. *Romona Co.* v. *Phillips*, 11 Ind. App. 118; 39 N. E. 96.

Admission of foreman not evidence against company. *Andrews* v. *Tamarack Co.* 114 Mich. 375; 72 N. W. 242.

Jury Questions. Whether a watchman was needed at a certain point on an underground tramway or whether the drivers could safely do their own watching was a question for the jury. *Weaver* v. *Iselin*, 161 Pa. 386; 29 Atl. 49.

Plaintiff injured by fall of staging which had been weakened by

great heat or concussion with hard substances in working the mine, and alleges carelessness and negligence in handling the same, causing the explosion, destroying the eyes of the plaintiff, and grievously injuring him in different parts of his body, for which injuries damages are claimed in the present action. A more detailed account of the operation of the mine is given in the declaration, and the defendants demanded a trial of the matters set forth, which, under the laws of Michigan, is equivalent to a plea of the general issue in the cause.

The plaintiff was a young man, of only 24 years of age, and he was not a miner by occupation, nor had he any experience as a miner. He was employed by the defendants chiefly in loading tram cars in their service, and knew little of the different explosives used in the mines. In further history of the operation of the mine, and of the condition of the engine house at the time of the explosion complained of, and its probable cause, the declaration alleges that the mining was

ore from a blast. *Held*, a case for the jury. *Eddy* v. *Aurora Co.* 81 Mich. 548; 46 N. W. 17.

The question of negligence on the facts is for the jury; also, the question of whether defendant was killed in the line of his duty. *Penn. Coal Co.* v. *Nee*, (Pa.) 13 Atl. 841.

Remaining after notice of unsafe tools. *Lehigh Co.* v. *Warrek*, 84 Fed. 866.

Whether the risk in question was a risk which plaintiff assumed, as a risk of the trade, is a jury question. *Hill* v. *Winston*, 73 Minn. 80; 75 N. W. 1030.

Question of contributory negligence to be left to the jury, not only where facts are in dispute, but where different minds would draw different conclusions as to negligence. *Linden* v. *Anchor Co.* 20 Utah 134; 58 Pac. 355. *Tennessee Co.* v. *Currier*, 108 Fed. 19.

It was for the jury to say whether a timberman was a fellow servant with a driver. *Cons. Coal Co.* v. *Scheiber*, 167 Ill. 539; 47 N. E. 1052. The same as to surface and underground miners. *Springside Co.* v. *Grogan*, 169 Ill. 50; 48 N. E. 190.

The question of safe place to work is for the jury. *Hamilton* v. *Mendota Co.* (Iowa) 94 N. W. 282.

Rules of the Mine. Where employes are in the habit of going through certain passages without restraint from the employers,

carried on by sinking shafts, driving drifts, stoping and excavating in the manner usual in the business of iron mining; that, in performing that work, rock, boulders, iron ore, gravel, sand, and earth were encountered and removed; that, in removing them and other hard substances, it became necessary to blast the same away by employing giant powder or dynamite of great explosive force; that the powder or dynamite thus used was put up in what were called "sticks," each stick being circular or nearly so, of a diameter of about 1½ inches, and about 8 inches long, wrapped in a paper covering; that the sticks were packed in sawdust in wooden boxes, there being about 50 in each box; that giant powder or dynamite, similar in kind or character to that thus used by the defendants, and also caps similar to those hereinafter mentioned, had been in general use in the mines of the upper peninsula of Michigan for 20 years previously; that the powder or dynamite during cold weather became frozen or hard, and in that

though another passage had been originally pointed out to them as the proper one, the employer is estopped to claim such use of passages as contributory negligence. *Pennsylvania Coal Co.* v. *Nee*, (Pa.) 13 Atl. 841.

Overloaded skip: Violation of rules as to overloading qualified by orders to get on. *Last Chance Co.* v. *Ames*, 23 Colo. 167; 47 Pac. 382.

Companies cannot make rules to shift their lawful risks upon the miner. *Himrod Co.* v. *Clark*, 197 Ill. 514; 64 N. E. 282.

Mistake of Judgment. It being uncertain whether one of a battery of shots had exploded a consultation was held after which plaintiff was ordered to work by the boss. The blast then went off and injured plaintiff. *Held*, two judges dissenting, a mistake of judgment, not negligence. *Harris* v. *Balfour Co.* 131 N. C. 553; 42 S. E. 973.

The doing of the wrong thing on fright or a sudden emergency is only an error of judgment, neither negligence nor contributory negligence. *Hughes* v. *Oregon Co.* 20 Wash. 294; 55 Pac. 119. *McMillan Co.* v. *Black*, 89 Tenn. 118; 14 S. W. 479.

Instructions in negligence case where servant ordered suddenly to do a dangerous act. *Deep M. Co.* v. *Fitzgerald*, 21 Colo. 533; 43 Pac. 210.

Infant Employes. Infant slipping on ice in quarry, no liability.

condition would not explode readily, and it was therefore necessary or at least advisable, before using it, to soften or thaw it, which was usually done by means of warm water, that being the safest means for that purpose, and, when thus thawed or softened, it was exceedingly sensitive and liable to explosion from heat or concussion,—a fact well known to the defendants; that the usual manner in which explosions were effected in blasting in the mine was by placing at the end of a stick or piece thereof a cap attached to a fuse, which was ignited, and then solid rock and ore could be blasted out by it; that the caps were shaped like ordinary percussion caps, and partly filled with a fulminate, which were then exceedingly sensitive and more powerful and more explosive than the dynamite; that they were liable to explosion from heat or by concussion against each other, or against any other resisting substance, and were put up in tin boxes, each containing about 100, lightly packed in sawdust, and were always

Any infant is assumed to have the ordinary intelligence of a lad of the same age. *Williamson* v. *Sheldon* Co. 66 Vt. 427; 29 Atl. 669.

Statement of what are the necessary allegations in complaint for injuring minor employee, where the fact of minority is a special incident in the case. *Brazil Co.* v. *Young*, 117 Ind. 520; 20 N. E. 423.

Minor not bound to knowledge of danger same as adult. *Northern Pac. Co.* v. *Richmond*, 58 Fed. 756. *Brazil Co.* v. *Gaffney*, 119 Ind. 455; 21 N. E. 1102; 12 Am. St. R. 422.

A minor employee assumes the usual risks of the trade the same as an adult. *South West Co.* v. *Smith*, 85 Va. 306; 7 S. E. 365; 17 Am. St. R. 59.

Incompetent Servants. Owner not liable for negligence of engineer in bad hoisting. The fact of previous mishaps not material unless owner had knowledge of them. *Mulhern* v. *Lehigh Val. Co.* 161 Pa. 270; 28 Atl. 1087.

Habits of employed contractor admissible to show hiring of incompetent person. *Berg* v. *Parsons*, 35 N. Y. S. 780.

If superintendent is negligent in fact, his general reputation is immaterial. *Malcolm* v. *Fuller*, 152 Mass. 160; 25 N. E. 83.

Specific acts of negligence are allowable in proof in aid of charge that defendant employed an unfit person as boss. *Green* v. *Western Co.* (Wash.) 70 Pac. 310.

It is error to receive evidence of drunkenness of vice principal

ready for use, not requiring any thawing before affixing the fuse and powder.

And the declaration further set forth that, on the day of the explosion hereafter mentioned, there was situated on the surface of the mine a house about 20 feet long by 18 feet wide and 1 story high, which was primarily intended for a dry or changing house for the captains and bosses of the mine, of which there were about 13; that there were in the house two drums, used mainly for lowering timber into the mine; that these drums were circular and about 3½ and 4 feet in diameter, respectively, and were operated by steam power, the steam being supplied through a pipe or pipes from a boiler about 50 feet distant; that 18 inches from one of the drums was a steam heater, consisting of about 60 coils of pipe, receiving steam from the boiler, intended to heat the house and

where the habits of such person were not the cause of accident. *Miller* v. *Bullion Beck Co.* 18 Utah 358; 55 Pac. 58.

Scope of the evidence where the accident is charged to employment of incompetent engineers. *Stoll* v. *Daly M. Co.* 19 Utah 271; 57 Pac. 295.

Incompetence of servant may be shown by frequently recurring instances of carelessness. *Cons. Coal Co.* v. *Seniger*, 179 Ill. 370; 53 N. E. 733.

In showing the incompetency of a servant and the master's knowledge of such incompetency, the fact that others refused to work with him is evidence. *Giordano* v. *Brandywine Co.* 3 Penne. (Del.) 423; 52 Atl. 332.

Single act of negligence by engineer not proof of incompetency. *Spring Valley Co.* v. *Patting*, 86 Fed. 433.

Injury by fellow servant, no recovery except for employing such servant knowing him to be incompetent. *McCharles* v. *Horn S. M. Co.* 10 Utah 470; 37 Pac. 733.

Settlement and Satisfaction. Enforcement of contract to pay wages to injured party in lieu of damages. *Pierce* v. *Tennessee Co.* 173 U. S. 1.

Settlement of claim for damages for miner killed, at $125, set aside as unconscionable. *Russell* v. *Dayton Co.* (Tenn.) 70 S. W. 1.

A receipt in full of damages with no proof of fraud is a *prima facie* defense to the action. *Scandinavian Co.* v. *Whittaker*, 40 Kan. 123; 19 Pac. 330.

dry the clothes of the men who changed their clothing there when they had become wet from the waters of the mine; that about a foot away from the heater, and against a wall of the house, was a shelf, consisting of a board fastened to the wall; that the drums and machinery in the house were in constant motion day and night, the machinery being kept running even when the drums were not in use hoisting or lowering in the mine, in order to keep the exhaust pipe from freezing; that the action of the machinery produced a constant jar in the building; that there was standing near the shelf and heater a barrel partly filled with ordinary lime; and that on the day of the explosion there was in the engine house, placed there by the direction of the defendants, for the purpose of storing and thawing or softening the same, 12 boxes of giant powder or dynamite, a box and a half lying loose on the shelf, a box about half filled on the floor and against the heater, and, scattered loosely on the floor, about 20 sticks or parts of sticks,

A note given to prevent a threatened suit for damages where payee evidently had no case held to be without consideration. *Bell* v. *Bean*, 75 Cal. 86; 16 Pac. 521.

Where an injured party under drugs or weakness signs a release for an inadequate sum, equity will relieve on return of the money and prompt application. *Roberts* v. *Central Lead Co.* (Mo. App.) 69. S. W. 630.

Dynamite cases. Asbestos Co. v. *Durand*, 30 Can. S. Ct. 285; 20 M. R.— and notes.

Where the accident itself proves the negligence. Id.

Proper parties. Union Co. v. *Crawford*, 29 Colo. 511; 22 M. R.— and notes.

Measure of damages. Id.

Contributory negligence. Portland Co. v. *Flaherty*, 111 Fed. 312; 21 M. R.— and notes.

Explosions. Bad ventilation. Id.

Fellow servant. Uren v. *Golden Tunnel Co.* 24 Wash. 261.

Cause of accident. Deserant v. *Cerillos Co.* 178 U. S. 409; 20 M. R.— and notes.

Disobedience of statutory regulations. Id.

Safe machinery. Safe place to work. Risks of the trade. Degree of care. Id.

Joint negligence or double cause of accident. Id.

some lying against or upon the iron pipe of the heater, a large quantity of powder lying between the heater and the nearest drum, occupying nearly the entire space between them, and about 3 sticks or parts of sticks resting on the lime, and a small quantity of the lime scattered on the floor and upon some of the powder, and on the shelf was a full box of caps, and in the engine house and near the heater was a box partly filled with caps; that during the day of the explosion, and while the powder and caps were located as stated, the machinery was in full operation, pounding and jarring, and the atmosphere of the room in the immediate vicinity of the powder and caps was heated from the heater and steam pipes to about 300° Fahrenheit, and the steam pipes were heated to the same degree, and, the room being hot, the plaintiff was obliged to open the door of the house when the ground was covered with snow to a depth of about a foot lying immediately in front of it and on the walks leading to the house, and several individuals who came into the house on the day of the explosion brought more or less snow on their feet and persons, which melted, and left water therefrom on and about the floor of the house and on the lime.

And it was averred that the powder or dynamite, when thawed out or softened, was very sensitive, and liable to explosion from the jarring of the drums and machinery, and the constant jarring of the building, and that the powder was liable to explosion from the heat of the steam heater and steam pipes and by the slacking of the lime in the lime barrel or on the powder; that the caps were more sensitive than the powder or dynamite, and more apt than the powder or dynamite to be exploded by the jarring and by the heat from the steam pipes and steam heater,—all of which particulars were well known to the defendants.

And the plaintiff further averred that he was hired by the defendants to run and operate the drums in the house, and that then the powder and caps were stored and kept in the

powder house of the defendants, and that afterwards they were stored in the engine house; and that he was at the time wholly ignorant that the powder or dynamite was liable to explosion from the jarring of the machinery, or by becoming overheated by the steam heater, or by the heat generated by the lime when slacking, or that the caps were also liable to explosion by such jarring of the machinery, or collision against any other resisting substance in the box, or by the heat from the steam pipes or steam heater; that he had never used the powder or the caps, or any other powder or caps similar in kind or character, and was entirely ignorant of their very sensitive character; and that, when they were placed in the house, he was not, nor was he at any time thereafter and before the accident, informed by the defendants or any other person of their sensitive and dangerous character, or that they were liable to be exploded; and that he continued to work in the house entirely ignorant of the danger to which he was thereby subjected.

And the plaintiff further averred that on the day of the explosion, while he was engaged about his business in the house, and while the machinery and the steam heater and steam pipes were in operation, and while the powder and caps and all the other articles and things were situated in the house as stated, and while he was conducting himself in a careful and prudent manner, and not touching, handling, or in any manner whatsoever meddling or interfering with the powder and caps or either thereof, and when he was about two feet distant therefrom, a part of the powder and of the caps, *caused, by being jarred, as mentioned, by the machinery, and overheated by the steam and steam pipes, and by the lime, suddenly, and without any warning whatsoever,* exploded with great force and violence, throwing pieces of tin and other hard substances into his eyes and into his body, and throwing him out through the open door about 50 feet distant therefrom; and that he was then and thereby grievously bruised,

maimed, and injured, and his eyes were permanently injured and destroyed, and he thereby became totally and permanently blind, and his body in other respects was maimed, mutilated, and injured.

And the plaintiff further averred that the explosion and the blinding and maiming and injury of himself were caused through the carelessness and negligence of the defendants *in storing the powder and caps in the house without informing him of the increased risk and danger of his remaining in employment therein;* in thawing and softening the powder by means of steam heat, instead of hot water; in thawing and storing the powder and caps in the house where the machinery was in operation, and where the steam heater and steam pipes were situated, and the lime was kept and used, as stated; and in placing or permitting to be placed, the powder and the caps near or around the steam heater, as stated,—for all of which the plaintiff claimed damages.

The substantial facts thus stated in the first count are set forth with more or less detail in the other counts of the complaint, of which there are several, and the allegations of negligence and carelessness on the part of the defendants are repeated, from which the explosion is alleged to have followed, and the dreadful injuries stated to have been caused to the plaintiff, and by which he was also deprived of all means of earning a livelihood. The jury found for the plaintiff, and assessed his damages in $10,000, upon which verdict judgment was entered in his favor, and the defendants brought the case to this court by writ of error.

A. C. DUSTIN, GEO. F. EDMUNDS, JAMES H. HOYT and GEORGE HAYDEN, for plaintiffs in error.

F. O. CLARK and R. C. FLANNIGAN, for defendant in error.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The testimony produced on the trial by the plaintiff and the defendants corroborated in all essential particulars the facts set forth in the declaration. It is not, however, as definite in its statement of the extent of the heat of the room on the day of the explosion. The declaration puts it at a very high degree Fahrenheit; and the plaintiff, who was examined on the subject, while he does not designate it by any thermometrical measurement, states that the heat from the heater and boiler was more than he could stand; and that the room was hotter than anything he had ever known before. He also testified that the machinery in the engine house was in operation all the time, in order to keep the steam in the pipes, and prevent them from freezing on the outside, and that the building was always shaking, so much so that a man's hat would not stay hung up when the machinery was in motion. He also added that he was not a miner, and did not know the first part of mining; that he had never handled any powder in blasting, or handled or worked with the caps used; that he did not know what dynamite or giant powder was made of, and never had any knowledge or experience in the use or handling of explosives, and he never was informed by the defendants or any one else of the danger he incurred in handling the powder and caps, or the danger of explosion of either from the great heat in the engine house, or from the concussion of the caps caused by its constant jarring.

It is clear from the whole evidence in the case that there was constant danger of explosion from the great heat produced in the operation of the mine, and from the concussion of the caps by collision between themselves and with other hard substances in the engine house and the powder scattered on the floor. The heat and concussion were a continuing danger to the safety of the persons employed in the mine, and of the existence of that danger the defendants were fully aware.

Rillston, the plaintiff, who was sworn as a witness in the

case, testified that at the time of the explosion there was in the engine house a coil of pipe, five barrels of oil, fourteen boxes of powder, a box and a half on the shelf, about half a box on the floor, a barrel of lime, several sticks in the lime, two boxes of caps, nine rings of fuse, and that there was powder on the floor thrown around in all directions.

Mr. Sellwood, the general manager of the mine for the defendants, testified that the caps and powder were put in the engine house by his orders, and admits that the usual place previously for keeping them was at the powder magazine.

Notwithstanding the continuing danger of explosion, both from the heat in the engine house and its constant jarring, and the confused and disorderly position in which the powder and caps were placed in the engine house, it does not appear that there was any effort made by the defendants, or others acting for them, to lessen either the heat or the jarring.

The court instructed the jury that it was a question for them whether there was negligence in the conduct of the defendants in reference to the use of the exploding caps,—that is, in putting them in the engine house, and in failing to give the plaintiff due warning of their dangerous character; and the jury found against the defendants on the question thus presented to them.

All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business and having sufficient skill therein, may properly be employed upon them; but in such cases, where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution, and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and

mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case, and the constant danger of their explosion from heat or collision, as already explained, was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. Indeed, we think it may be laid down as a legal principle that in all occupations which are attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and that the neglect to provide such readily attainable appliances will be regarded as proof of culpable negligence. If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers, and suffer in consequence, the employers will also be chargeable for the injuries sustained. Both of these positions should be borne constantly in mind by those who engage laborers or agents in dangerous occupations, and by the laborers themselves, as reminders of the duty owing to them. These two conditions of liability of parties employing laborers in hazardous occupations are of the highest importance, and should be in all cases strictly enforced.

Further than this, it is plain from what has already been

stated that the plaintiff knew nothing of the special dangers attending his work, or that he was at all informed by the defendants on the subject. His testimony is positive on this point, and is not contradicted by any one. With that fact shown, there was no ground for any charge of contributory negligence on his part; and with the defendants' negligence established, as stated, there could have been no serious objection to the damages awarded to the plaintiff for the dreadful injuries sustained. The sum recovered was a moderate compensation to be awarded to him.

Judgment affirmed.

JULIUS LEWEY v. H. C. FRICK COKE CO.

(166 Pennsylvania 536; 31 Atl. 261. Supreme Court. March 11, 1895.)

[1]**Secret trespass discovered after limitation period.** Where a landowner by means of openings on his land and subterranean passageways, mines and removes the coal from the adjoining land, without the knowledge or means of knowledge by the owner of the latter, limitation of his right of action for compensation does not begin to run until he discovers the trespass, or until discovery is reasonably possible.

Appeal from Court of Common Pleas, Westmoreland county.

Action of trespass by Julius Lewey against the H. C. Frick Coke Company, a corporation. From a judgment for defendant, plaintiff appeals. Reversed.

WILLIAMS, SLOAN & GRIFFITH and ATKINSON & PEOPLES, for appellant.

JAS. S. MOORHEAD and JNO. B. HEAD, for appellee.

WILLIAMS, J. The legal question on which this appeal depends is beset with difficulty. The interests to be affected by it must increase in magnitude as the value of the minerals in which this state abounds increases. It is not directly ruled by any of our own cases, and we are at liberty to treat it as a question of first impression. The facts are not in dispute. The plaintiff is the owner in fee simple of a lot of land lying in the outskirts of the borough of Connellsville, containing about one acre and a quarter. This lot is underlaid

[1]The right of action does not accrue until the damage results—surface support case. *Hall* v. *Duke of Norfolk*, L. R. 2 Ch. (1900) 493; 20 M. R.—.

In *Noonan* v. *Pardee*, 200 Pa. 474; 21 M. R.—, an action for loss of surface support, the text case is distinguished or attempted to be distinguished; and in *Williams* v. *Pomeroy Co.* 6 M. R. 195, the Supreme Court of Ohio held that no distinction can be drawn on the effect of the Statute of Limitations between secret and open acts of trespass.

See *National Co.* v. *Minnesota Co.* 17 M. R. 44 and notes.

with coal, which has not been severed from the surface by lease or sale, and which the plaintiff has made no effort to mine or remove. The defendant company owns a considerable body of coal lands in the same neighborhood, which adjoins and practically surrounds the plaintiff's land, and is engaged in mining and removing its coal through openings upon its own lands.

In 1884, in the progress of its mining operations, the defendant company made an opening or passageway through the plaintiff's coal under one corner of his lot, which was from 75 to 100 feet in length, about 6 feet in height, and 8 to 9 feet wide. The coal removed, amounting to more than 4,000 bushels, was brought to the surface through the defendant's pits or openings on its own lands, and used or disposed of as its own. The plaintiff had no knowledge of the trespass upon him or the removal of his coal, and no means of knowledge within his reach. In 1891, some seven years after his coal was taken, as he alleges, he first became aware of his loss. In the following year he brought this action, and is met with the statute of limitations as a defense. The contention is that it began to run in 1884, when the coal was taken, and had barred his remedy one year before he knew that a cause of action had accrued. The court below so ruled. The correctness of this ruling is the only question now to be considered. When did the statute begin to run? The general rule is, as stated by the learned trial judge, that it begins to run from the act done, but this is not of universal application. The statute makes certain exceptions. As to all persons who may be, when the cause of action accrues, "within the age of twenty-one years, femme covert, non compos mentis, imprisoned, or beyond sea," it is provided that the statute shall not begin to run until such disability ceases. In 1842 a supplementary statute restrained the running of the limitation still further so as to include a resident plaintiff, laboring under no disability whatever, if the defendant debtor or wrongdoer

should be beyond sea when the cause of action arose. As to such a plaintiff the running of the statute does not begin until the return of the debtor or trespasser to this country, so that proceedings against him become possible. It is easy to see that the mischief which the statute was intended to remedy was delay in the assertion of a legal right which it was practicable to assert.

The remedy provided was a denial of process to one who had slumbered for six years during which process was within his reach. The cases in which this denial would work a positive and an apparent hardship, so far as they were foreseen by the lawmakers, were provided for by the exceptions to which we have referred and by the act of 1842. These have been extended by the courts so as to include other cases which, while not within the letter of the statute, were held to be within the spirit of the proviso. Thus, it was held in *Hall* v. *Vandergrift,* 3 Bin. 374, that "it is the spirit of the statute of limitations to allow 21 years from the time that a person might make entry on land and support an action" before taking away his remedy. For this reason it was decided that it did not run against one who had a possibility of title, but no present right of entry. Again, it was held that, when the plaintiff had been kept in ignorance of his rights by fraudulent practices on the part of the defendant, the statute did not begin to run against him until discovery of the fraud.

The earliest case I have found in which the courts of this state applied this doctrine in a common-law action is *Jones* v. *Rees' Ex'rs,* found in 1 Smith's Laws, p. 80. The case was tried at circuit before Yeates and Smith, justices. It appeared that Rees had sold a negro to Jones in 1786, alleging him to be a slave. The negro was in fact a freeman, but had been kept in ignorance of it by the fraudulent practices of Rees. He discovered the fraud and his own freedom in 1801, and brought an action against Jones for the purpose of having his freedom established in a court

of law, and of recovering damages for his deprivation of it. He recovered. Jones then brought an action against Rees to recover the price paid for the negro some 16 years before, and for damages. Rees set up the statute of limitations. The court refused to sustain the plea, giving as a reason therefor that, "whenever there is a fraud, the act of limitations is no plea, unless the fraud be discovered within the time;" that is, within the time fixed by the statute, or six years before suit brought. To make this entirely clear, it was added that "while the slavery of the negro was uncontested, the plaintiff had no ground to suppose he had been injured or deceived; but, when he obtained his liberty in a due course of law, the plaintiff's cause of action accrued against the defendants." This rule was applied in an action of ejectment in *Thompson* v. *Smith,* 7 Serg. & R. 209, and was stated by Tilghman, C. J., at page 214, as follows: "After the discovery of the fraud, a man has a right to avail himself of the statute; but so long as the fraud is unknown, pending the concealment of the fraud, the statute ought not to run. The discovery of the fraud gives a new cause of action." This rule has long been applied in equity, where two good reasons are given for it. The first is that it would be inequitable to permit a defendant to profit by his own fraud. The other is that one who cannot assert his right, because the necessary knowledge is improperly kept from him, is not within the mischief the statute was intended to remedy, but is within the spirit of the proviso that restrains its operation. Courts of equity go a step further still, and decline to apply the statute where the plaintiff neither knew, nor had reasonable means for knowing, of the existence of a cause of action. But if the cause of action be known, or might have been known by the exercise of vigilance in the use of means within reach, equity follows the law and applies the statute. *Hamilton* v. *Hamilton,* 18 Pa. St. 20; *Neely's Appeal,* 85 Pa. St. 387. Mere ignorance will not prevent the running of the statute in equity any more than at

law; but there is no reason, resting on general principles, why ignorance that is the result of the defendant's conduct, and not of the stupidity or negligence of the plaintiff, should not prevent the running of the statute in favor of the wrongdoer. It seems to be the general doctrine in courts of law that the plaintiff is bound to know of an invasion of the surface of his close. The fact that his land is a forest, and that the defendant goes into its interior to trespass by the cutting of timber, does not relieve against its operation. What is plainly visible he must see at his peril, unless, by actual fraud, his attention is diverted and his vigilance put to sleep. But ought this rule to extend to a subterranean trespass? The surface is visible and accessible. The owner may know of its condition without trespassing on others, and for that reason he is bound to know. The interior of the earth is invisible and inaccessible to the owner of the surface, unless he is engaged in mining operations upon his own land; and then he can reach no part of his own coal stratum except that which he is actually removing. If an adjoining landowner reaches the plaintiff's coal through subterranean ways that reach the surface on his own land and are under his actual control, the viligance the law requires of the plaintiff upon the surface is powerless to detect the invasion by his neighbor of the coal 100 feet under the surface.

The case at bar affords an excellent illustration of ignorance due to the defendant's conduct, and without fault on the part of the plaintiff. The defendant was mining its own coal through its own shafts or drifts opened on its own lands. In the course of its operations, and for its own convenience, it pushed an entry or passage under the plaintiff's lands, and appropriated the coal removed therefrom. It was bound to know its own lines, and keep within them. If, by mistake or for any other reason, it did invade the mineral estate of another, and remove and appropriate the coal therefrom, good conscience required that it should disclose the fact, and

pay for the coal taken. Its failure to do this is, in its effects, a fraud upon the injured owner; and if he has no knowledge of the trespass, and no means of knowledge, such a fraud, whether it be called constructive or actual, should protect him from the running of the statute. We have felt constrained to recognize the susceptibility of land to division into as many estates in fee simple as there are strata that make up the earth's crust, and to protect the owners of these separate estates from each other. Thus, the possession of one who has a title to the surface only does not extend to or affect any subjacent estate. The occupancy of a coal stratum for more than 21 years will not give title to the surface above it, or the oil or gas stratum below it. The law does not require impossibilities. It recognizes natural conditions, and the immutability of natural laws. The owner of the surface cannot see, and because he cannot see the law does not require him to take notice of what goes on in the subterranean estates below him, with which he has no communication through openings within his inclosures or under his control. On the other hand, one who is in possession of a lower stratum is not bound to know, nor can he be affected by, what is going on upon the surface above him, or in a still lower estate under his feet. The owner of each stratum must, however, take notice of what affects his own estate so far as he is in possession of or has access to it. In the case before us no severance of the coal from the surface has taken place. The title of the plaintiff extends from the surface to the center. But actual possession is confined to the surface. Upon the surface he must be held to know all that the most careful observation by himself and his employes could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins, deep down in the earth, he cannot see. Neither in person nor by his servants or employes can he explore their recesses in search for an intruder. If an adjoining owner goes beyond his own boundaries in the course of

his mining operations, the owner on whom he enters has no means of knowledge within his reach. Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon. To require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible.

In the English courts this question has arisen quite frequently. The old rule applied in the courts of law was that the statute might be successfully pleaded as running from the date of the trespass. In the courts of equity, where an account for the coal that has been taken was asked for, it was applied only from the discovery of the trespass. McSwinny, Mines, 543. See, also, *Hovenden* v. *Lord Annesley,* 2 Schoales & L. 634. If, after discovery, or the happening of any circumstance calculated to put the owner on notice, he slept on his rights till the statutory period had expired, he was held bound by the statute in equity precisely as he would have been at law. If he knew, or if by the exercise of reasonable care he might have known of the trespass, the statute ran from the discovery, or the time when discovery could have been made. Bainb. Mines, 515, 516. It was against good conscience to permit one who had taken the property of another without the owner's knowledge, and who had failed to disclose or to account for what he had taken, to avail himself of the statute while the owner remained in ignorance of his loss. When compensation was sought by means of a bill for an account, it was held that the statute began to run at the time of discovery, regardless of the time of taking. The same

question was also encountered in actions to recover for injuries done on the surface by subsidence due to the withdrawal of support. When the action was trespass, it was generally held that the statute ran from the date of the removal of the support, which was the trespass to which the injury was due; but, when the action was case, the subsidence was treated as the consequence of the wrongful removal of the coal or other underlying stratum, and the damages suffered as consequential. The happening of the injury was upon this ground held to give a cause of action, against which the statute would run only from its date. The removal of the supports might not be known to, or be discoverable by, the owner of the surface until the subsidence revealed it; and, unless the injury consequential to the trespass could be treated as creating a cause of action, in most cases redress for a substantial injury would be denied altogether. 34 Law J. Q. B. 181, *Backhouse* v. *Bonomi,* 9 H. L. Cas. 503; *Smith* v. *Thackerah,* 15 Am. Law. Reg. (volume 5, N. S.) 761, and note. The reason for the distinction exists in the nature of things. The owner of land may be present by himself or his servants on the surface of his possessions, no matter how extensive they may be. He is for this reason held to be constructively present wherever his title extends. He cannot be present in the interior of the earth. No amount of vigilance will enable him to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands. His senses cannot inform him of the encroachment by such trespasser upon the coal that is hidden in the rocks under his feet. He cannot reasonably be held to be constructively present where his presence is, in the nature of things, impossible. He must learn of such a trespass by other means than such as are within his own control, and, until these come within his reach, he is necessarily ignorant of his loss. He cannot reasonably be required to act until knowledge that action is needed is possible to him.

We are disposed to hold, therefore, that the statute runs against an injury committed in or to a lower stratum from the time of actual discovery, or the time when discovery was reasonably possible. But it is enough for the purposes of this case to hold that, inasmuch as equity is administered in this state through the common-law forms of action, the plaintiff need not be turned out of a court of law in order to be admitted at the equity side of the same court. He may not be entitled to statutory damages, but he is entitled to compensation in the same manner that he would have been on a bill for an account. For this purpose, the equitable rule that the statute shall run only from discovery, or a time when discovery might have been made, should be applied by courts of law. It follows that the judgment in this case must be reversed, and a new trial had, in which the jury should be instructed that, while the statute may be available as against the penal consequences of the trespass, it is not available as a defense against payment for the coal actually taken and converted to the use of the defendant. The statute will run against a claim for compensation from the time the existence of the claim was or might have been known to the plaintiff, the owner and occupier of the surface.

The judgment is reversed, and a venire facias de novo awarded.

MITCHELL J., dissents.

[1]DEL MONTE MINING & MILLING CO. v. NEW YORK & LAST CHANCE MINING CO.

(66 Federal 212. Circuit Court, District of Colorado. March 13, 1895.)

One set of end lines. Patent fixes end lines, and not the overlapped location. A controversy arising from overlapping locations, after being carried on both before the land office and the courts, was compromised by allowing one of the locations to patent most of the disputed land. A company was then organized, representing both parties to the dispute and the land was conveyed to it. *Held*, that this company could not refer its title to either or both of the contending locations, at its election, so as to give it the right to follow the dip within the end lines of either location at will, but on the contrary, it must derive its rights in this respect solely from the location under which the patent was obtained.

[2]**Vein through one end and one side line.** The fact that the apex of a vein, on its strike, passes through one end line and one side line of the location, does not cause both of these lines to be regarded as end lines, so as to destroy the parallelism, without which there is no right to follow the dip laterally beyond the boundaries of the claim. On the contrary, the owner of such a claim will have a right to follow the dip, within his own original end lines, so far as he holds the outcrop within his location.

This was a bill by the Del Monte Mining & Milling Company to enjoin the New York & Last Chance Mining Company from working within complainant's claim.

THOMAS, HARTZELL, BRYANT & LEE and H. G. LUNT, for complainant.

WOLCOTT & VAILE, for respondent.

HALLETT, District Judge. Complainant seeks to en-

[1]For the case at law over the same property, see *Del Monte Co.* v. *Last Chance Co.* 171 U. S. 55; 19 M. R.—

[2]*Tyler Co.* v. *Sweeney*, 54 Fed. 284. *Last Chance Co.* v. *Tyler*, 61 Fed. 557. *Cons. Wyoming Co.* v. *Champion Co.* 18 M. R. 113. *Clark* v. *Fitzgerald*, 171 U. S. 92. *Carson City Co.* v. *North Star Co.* 73 Fed. 597; Affirmed 83 Fed. 658; 19 M. R.—

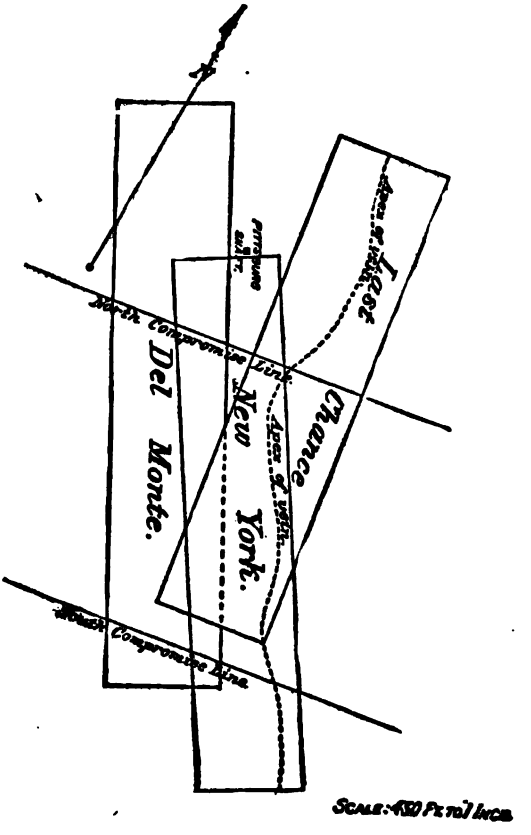
join work on a mine called "Del Monte," situate in Sunnyside mining district, Mineral county. The mine is on Bachelor Mountain, near the crest thereof, and the location follows the general course of the crest from north to south. Respondent's property is adjacent, and somewhat below complainant's claim on the side of the mountain. The relative position of the claims is shown in the accompanying diagram much better than can be explained otherwise.

The diagram shows also the apex of the vein as claimed by respondent. But it should be observed that this marks only the foot wall of the lode, and the position of the hanging wall is the subject of much controversy in the suit.

Respondent's territory is within the lines marked "North Compromise Line" and "South Compromise Line." Respondent holds this territory under the New York and Last Chance locations, which are shown on the diagram. Each party holds by patent, and there is no dispute as to surface lines. Respondent, claiming to have the apex and outcrop of the lode within its territory, asserts the right to follow the lode on its dip beneath the surface of the Del Monte location. Complainant's position is that respondent has no extralateral right—First, because it has not the whole of the vein within its territory, the hanging wall being within the Del Monte territory. Upon this proposition the testimony is highly conflicting, and of a character to be submitted to a jury, with a view to ascertain the fact; but it is not regarded as sufficient to establish the fact. In the present inquiry the outcrop of the lode will be taken to be within respondent's territory, and on the line of the foot wall as shown on the diagram.

The second point against respondent's claim of extralateral right is that the outcrop of the lode does not follow the New York location from end to end, but passes out of the east side of the claim near the north end, as shown on the diagram. Respondent admits that the main lode has this course and

direction, but it also maintains that one fork of the lode, leaving the main lode at or near the point of divergence, continues through the north end of the claim and across the north end line, at or near the Pittsburg shaft. The proof of this condition is no more satisfactory than that which re-



lates to the width of the lode. While there is some evidence as to the existence and extent of a branch or fork of the lode at the northern end of the claim, which may be proper for the consideration of a jury, I am compelled to say that the

fact is not established; so that, for the purpose of deciding the motion now under consideration, we must take the line of outcrop to be as marked on the diagram, and extending from the south end line of the New York location to a point some 280 feet south of the northeast corner, where it diverges into the Last Chance location.

So understood, the question is whether respondent can follow the lode on its dip outside its own territory, and within the lines of the Del Monte claim, extended down vertically. Some years back, and before patents were obtained, these locations were held by different owners, between whom a controversy arose as to the ownership of the territory common to both locations. Upon the application of the owners of one of the claims for patent, the owners of the other claim made adverse claim in the land office, pursuant to the act of congress governing such matters. Thereupon the controversy was renewed in court, and was there pending for a considerable time without trial or judgment. The parties then came to an agreement by which the New York location was allowed to patent the greater part of the territory in dispute, as indicated on the diagram, and the New York & Last Chance Mining Company, respondent in this suit, was organized to represent the parties respectively, and the ground in dispute was conveyed to respondent in settlement of the controversy. A title so arising may, it is said, be referred to one or the other or both of the contending locations, and respondent may follow the end lines of one or the other location in its election. This, however, cannot be accepted. As respondent's territory was patented under the New York location, the lines of that location must control all questions of ownership. The controversy prior to patent is of no weight whatever as to any right arising under the patent for one claim or the other. If the strike of the lode in the New York location kept its course from end to end of the location, the right to follow the lode outside the location would not be

denied. As, however, it departs on its strike from the location on the east side, and not from the north end, it is said that the claim has no end lines, or, at all events, none that can be recognized as limiting the right to any part of the vein outside of the exterior lines of the claim. This is asserted as a proposition of law deducible from several decisions of the supreme court that the lines of a location crossed by the apex of a vein on its strike shall, as to such vein, be regarded as end lines, whatever their position may be; and, if this proposition be accepted, the south end line and east side line, intersected by the outcrop of this lode, are not parallel to each other, as demanded by section 2320 of the Revised Statutes. This, however, has not been the interpretation of the law in the supreme court, or in any court, so far as we are advised. It is true that in the *Flagstaff Case,* 98 U. S. 463, and recently in the *Amy-Silversmith Case,* 152 U. S. 223, 14 Sup. Ct. 510, the supreme court declared that the side lines of a location shall be end lines whenever the lode, on its strike, crosses such lines; but these decisions do not affirm that all lines of a location crossed by a lode on its strike shall be end lines. The most that can be deduced from them is that opposite lines, parallel to each other, when crossed by the lode, shall be end lines. The case presented is not within the principle of these decisions. We have a lode extending on its strike on the general course of the location, and within its side lines, a distance of 1,070 feet. It is conceded that the south end line of the location is well placed, and all parts of the lode covered by the location are within the end lines as fixed by the locator. The difficulty arises from the circumstance that the location extends in a northerly direction about 280 feet beyond the point where the lode diverges from the side line. No reason is perceived for saying that this mistake in the length of the location should defeat the right to follow the vein on its dip outside the location. It is said that we cannot make a new end line

at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. *Iron Silver M. Co.* v. *Elgin M. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177. This, however, is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line; and, if there be magic in the word "line," it will be better not to use it.

In this instance, as in most controversies between adjacent owners, it is necessary to ascertain what part of the lode is within the New York location, and this, according to the map, appears to be 1,070 feet. At all points on the dip of the lode into the mountain westwardly we can ascertain the length of the lode within the end lines by measuring the same distance from the south end line produced. In this proceeding there is no departure from the end lines of the New York location as fixed by the locator, and there is no new line of location drawn for any purpose whatever. We keep entirely within the end lines of the location as required by the statute, and the circumstance that we are somewhat short of the north end line does not in any way affect the principle to be followed in construing the statute. The same rule would be adopted if the lode were physically shorter than the location. Let it be assumed that upon a lode of the length of 1,000 feet (which is not an extraordinary occurrence) a location shall be made of the length of 1,500 feet, extending 250 feet in each direction beyond the ends of the lode. Would any one deny the right of the locator to follow the lode within his end lines, upon the ground that the lode did not come to either of such lines? I think not. The case is not different when the lode intersects one end lien and not the other, but keeps within the location for a considerable distance. In that case, as in the accepted case of a lode traversing the location from end to end, the locator ought to be allowed to follow his lode into adjoining territory, so far as he may

within his end lines, and so far as he holds the outcrop in his location. Upon this construction of the statute respondent is entitled to so much of the lode upon its dip as lies between the south compromise line and the point of divergence of the apex of the vein from the New York location. This point, as nearly as can be determined at this time, is 1,070 feet from the southeast corner, or, proceeding in the other direction, 280 feet from the northeast corner. Following the course of the end lines of the New York location in a westerly direction from this point, there is a considerable space, which widens in the westward course between the line last mentioned and the north compromise line. To this respondent is not entitled, as against complainant, the owner of the Del Monte claim. So much of the territory last mentioned as lies west of the east side line of the Del Monte location is subject to the prayer of the complainant's bill.

The engineers will be able to state the boundaries in detail, and an order may be entered allowing the injunction as to that part. As to the territory south of that last mentioned, the motion will be denied.

[1]A. W. STINCHFIELD v. JAMES N. GILLIS ET AL.

(107 California 84; 40 Pac. 98. Supreme Court. April 5, 1895.)

Deed covers all veins within the tract. Where a party holding a mining claim under a certain name conveys a parcel of it by metes and bounds and further describing the parcel sold by a new name used merely to distinguish the parcel conveyed, the grantee takes all the veins apexing within the area described and no rights remain in the grantor to follow a cross vein into the ground granted.

No cross lode right reserved. Section 2336 U. S. Rev. Stat. concerning cross lodes has no application when grantor conveys a tract by metes and bounds without reservation.

Monuments control measurements and in trespass parol evidence of such monuments is admissible to identify the land conveyed to and claimed by the plaintiff.

In bank. Appeal from Superior Court, Tuolumne county; G. W. Nicol, Judge.

Action by A. W. Stinchfield against James N. Gillis and others to recover the value of minerals alleged to have been taken from plaintiff's mining claim. From a judgment for plaintiff, defendants appeal. Affirmed.

F. W. STREET and J. F. ROONEY, for appellants..

I. M. KALLOCH, F. P. OTIS, and WHEATON KALLOCH & KIERCE, for respondent.

HARRISON, J. Upon the former appeal in this case (17 M. R. 497), it appeared that the Carrington mine was a single claim held by the defendant Gillis, of which he had sold a portion to the plaintiff, and it was held that by virtue of his deed to the plaintiff, Gillis was estopped from question-

[1]Error to U. S. Supreme Court dismissed on ground of no Federal question: 159 U. S. 658.

[2]*Book* v *Justice Co.* 17 M. R. 617. *Coffee* v. *Emigh*, 15 Colo. 184; 25 Pac. 83. *Calhoun Co.* v. *Ajax Co.* 27 Colo. 1; 20 M. R.—

ing the right of his grantee to all of the gold found within the surface lines of the deed, irrespective of the depth below the surface at which it was found. After the case went down to the Superior Court for another trial the defendants amended their answers, presenting issues to the effect that the tract of ground which was sold to the plaintiff was known as the Pine Tree claim, and was distinct from that known as the Carrington claim, which was retained by Gillis, and had been located subsequent to the location of the Carrington claim; that upon these facts they were entitled to the gold found at the place of intersection of the Rice vein and the West vein, although that place of intersection was within the surface lines of the grant to the plaintiff. Upon the issues thus presented, the Court found that for nearly fourteen years prior to the sale to the plaintiff the mining ground held by the defendant Gillis, including that sold to the plaintiff, as well as that retained by himself, had been held and claimed by him as a single mining claim, and was known and designated as the "Carrington" claim, and that during this time no Pine Tree mine or claim had existed; that prior to the sale and conveyance to the plaintiff, Gillis had pointed out to him the boundaries of the Carrington claim, and told him that the ground so sold and conveyed was a part of that claim; that before the execution of the deed Gillis and the plaintiff went together upon the ground and marked off and agreed upon the portion of the claim to be sold to the plaintiff, and established visible monuments at each of the four corners, and agreed upon the dividing line between the portion to be sold to the plaintiff and the portion to be retained by the defendant, and established and agreed upon permanent monuments marking said dividing line; that the ground was conveyed according to these monuments, and in the conveyance to the plaintiff was designated as the Pine Tree mine for the purpose of distinguishing it from the remaining part of the Carrington claim retained by Gillis. In 1854 the Carring-

ton claim was located for one thousand feet in length, and one hundred feet on each side of the vein, and in 1859 or 1860 T. E. Carrington, then being in possession of the Carrington claim, posted notices on the Pine Tree vein, adjacent thereto on the east, claiming three hundred feet along said vein. Carrington remained in possession of this property until some time in 1870, when he moved away from the county, leaving the whole of the mining ground in charge of one Stoker, and instructed him to do the assessment work thereon. Stoker took possession of the entire ground in which the Carrington and Pine Tree veins lay, and held it for Carrington as one claim until June, 1872; and during this time the entire ground was held and known as the Carrington claim, and all the assessment work that was done upon the ground was done as and for the Carrington claim. In June, 1872, Carrington sold to the defendant Gillis his interest in the mining ground—including in the deed of conveyance claims on all sides of the Pine Tree mine, but not mentioning any claim or mining ground by that name—and upon the execution of this deed Stoker turned over to Gillis the possession of all the ground that he had been holding for Carrington; and Gillis remained in possession thereof until his conveyance to the plaintiff in 1886. Upon these facts the court rendered judgment in favor of the plaintiff. The defendants have appealed.

We are of the opinion that the additional facts presented upon this appeal do not take the case out of the principles under which the decision of the former appeal was given. The mining ground held by Carrington, of which Gillis took possession under his deed of June, 1872, must be considered as a single claim irrespective of the original locations of the different parts of the claim. Whatever distinction may have been at one time observed between the original location of the Carrington mine and that of the Pine Tree mine, it was disregarded by Carrington during a large portion of the time

these claims were held by him, and after he left the county the entire mining ground, which included them both, was treated as one claim, not only while Stoker held them, but also during all the time that Gillis held them until his conveyance to the plaintiff. That conveyance did not purport to be made in accordance with the lines or claim of any previous location, but was a conveyance of a tract of mining ground carved out of another tract known as the "Carrington" claim by metes and bounds agreed upon between the parties, and which they both treated as a part of the Carrington claim, but which, for the sake of convenience, was designated in the conveyance as the Pine Tree claim. Under these facts the conveyance from Gillis to the plaintiff must have the same effect as though the entire ground held by him previous to the conveyance was held by mere possession, or under a patent from the United States, or as if the two veins were a part of the same location. At the former appeal herein it was held that if the locator of a mining claim should convey a portion of his claim without any reservation in his deed of conveyance, his grantee would be entitled to all the gold that might be found within the ground conveyed in any vein whose apex was within the surface lines of his deed; so, if a locator should convey to A the east half of his claim, and afterward should convey the west half to B, each of his grantees would in the same manner be entitled to all of the gold found in any vein which was entirely within the surface lines of his conveyance; and, on the same principle, if the proprietor of a tract of mining ground which has been derived through several locations should dispose of the same in parcels irrespective of the lines of such locations, the rights of his grantees would be measured by the terms of their deeds. In such cases section 2336 of the Revised Statutes of the United States has no application. That statute was not intended to limit or define the rights of a person in mere possession of a tract of mining ground where

there is more than one vein, or to prescribe the effect of a conveyance by the locator of a claim of a portion of his location containing one of such veins. The object of the statute was to supplement the provisions of section 2332, and to prescribe rules under which different locations by different proprietors should be held, and to determine the rights of such proprietors in case of intersecting veins. At the date of the passage of that act, May 10, 1872, the Carrington claim was and had for many years been held as a single claim, without any adverse claim thereto, and it continued so to be held until the conveyance by Gillis to the plaintiff in 1886. The position of the proprietor of a mining claim who conveys a portion thereof, and retains the remainder, is analogous to the position of the United States after it has issued its patent for a location. As the United States, as well as a subsequent locator, holds the unpatented claim subject to the prior rights of the patentee, as prescribed by section 2336, so the grantor of a portion of his claim, in the absence of any reservation in his deed, or proof of mining customs, holds the ungranted portion subordinate to the rights of his grantee in the ground conveyed.

The effect of the deed from Gillis to the plaintiff was to estop him and those claiming under him from questioning the title of the plaintiff to all the gold that might be found in the West vein, within the surface lines of his deed. The gold in controversy was found within the surface lines of this deed, and it was also found within the limits of the two walls forming the West vein, although the place at which it was found is also within the lines of the walls which form the Rice vein. This latter circumstance does not, however, relieve Gillis from the estoppel of his deed, for as the deed contains no reservation, and as there was no evidence at the trial of any mining customs, effect must be given to the deed according to its terms, by holding that the entire West vein within the surface lines, even though intersected by another

vein, passed to the plaintiff. In thus holding, we concede that when mining ground is conveyed by deed without express limitation, the grantee takes subject to the characteristics of mining property given to it by prevailing customs and laws, and not with the absolute dominion which flows from a conveyance in fee of ordinary land. The mining land thus granted is still subject to all mining laws and customs which are applicable, but the provision of section 2336 that, when two veins intersect, "priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection," cannot possibly be applied to the case where A conveys part of his mining claim to B, for in such a case there is no "prior location." Therefore, in such a case, the ordinary rules which govern grants of lands must of necessity apply; and, if the intersection takes place on part of the claim conveyed, the grantee takes all the mineral within the space of intersection.

Whether the plaintiff would have been entitled to follow the West vein into the ground retained by Gillis, and to claim the gold found therein, or whether Gillis would have been entitled to any of the gold that might be found in the Rice vein, within the ground conveyed to the plaintiff, are questions which are not involved in this appeal, and upon which we do not express any opinion. All that we hold is that, inasmuch as the gold in question was within the ground conveyed by Gillis to the plaintiff, and in a vein whose apex was within the surface lines of that ground, it belonged to the plaintiff.

Certain rulings of the court upon the admission of evidence to show the boundaries of the lands described in the deed from Gillis to the plaintiff are assigned as error; but we are of the opinion that the rulings were correct. The description in the complaint follows that in the deed from Gillis to the plaintiff, and, in addition to giving the length of each side of the ground, designated certain monuments

as the corners of the tract conveyed. If these monuments can be ascertained, they will prevail over the designated measurements, and the evidence offered was for the purpose of pointing out upon the surface of the earth the monuments which had been agreed upon in the sale, and which were named in the conveyance. For this purpose the court was authorized to receive parol evidence in order to show the identity of the land so conveyed with that upon which the trespass had been committed.

The judgment and order are affirmed.

McFARLAND, J., and VAN FLEET, J., concurred.

GAROUTTE, J., concurring. While I do not think the decision in this case upon the former appeal is at all conclusive, as to the questions raised by the present appeal, still I concur in the judgment upon the ground that the facts do not bring the case within the provisions of section 2336 of the Revised Statutes of the United States. And when that statute does not apply, and there is no other law or mining custom applicable to the facts, I think the grantee of the surface ground must be held to take all the mineral at the point of intersection.

JOHN BALFOUR v. C. T. RUSSELL ET AL.

(167 Pennsylvania 287; 31 Atl. 570. Supreme Court. April 8, 1895.)

[1]**The parties' own construction where the language admits of a doubt will** be the Court's construction of their contract.

[2]**Well sunk within the reservation.** Where the lease reserves a certain acreage within which no well is to be sunk but the lessee with the lessor's consent sinks a well within the reserve such well is entitled to all the rights of any well sunk outside the reservation.

Appeal from Court of Common Pleas, Butler county.

Action of ejectment by John Balfour against C. T. Russell and another. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

LEV. MCQUISTION, J. C. VANDERLIN and A. B. C. MCFARLAND, for appellant.

JAMES BREDIN and S. F. BOWSER, for appellees.

MCCOLLUM, J. We think this case was correctly decided in the court below. The plaintiff leased the land in dispute to John A. Snee, for the purpose of exploring for and obtaining oil or gas. The lease was for three years, or while oil or gas was produced from the demised premises in paying quantities. The continuance of the lease beyond three years was contingent upon the production of oil or gas in such quantities within that time. Snee drilled two wells. One of them was not worth operating, and he abandoned it. The other produced oil in paying quantities. He then assigned his interest in the lease to the defendants, who drilled

[1]*American Co.* v. *Virginia Co.* 91 Va. 272; 21 S. E. 466.

[2]Where the lease reserves a certain acreage within which no well is to be sunk "as a protection against fire," the lessor cannot himself sink a well within such reserve. *Lynch* v. *Burford*, 201 Pa. 52; 50 Atl. 228.

two wells, with a like result. All the wells were drilled within the three years; and, as two of them were paying wells, the learned court below thought they were sufficient to continue the lease while oil was obtained from them at a profit. It is conceded that this is a correct view of the case if the producing wells are upon the demised premises. The plaintiff, however, contends that these wells are on land expressly excepted from the lease. Is this contention sound and consistent with a fair construction of that instrument? We think it is not. In the first place, it is not in accord with the construction adopted by the parties, and under which rent was paid for three years. The land on which the producing wells were drilled is admittedly a part of the 70 acres described in the lease, and on which the lessees paid rent at the rate of three dollars per acre. If the parties had understood that the lease included only 66 acres, the lessor would not have exacted and the lessees would not have paid rent on 70 acres. If the language of the lease fairly raised a doubt respecting the intention of the parties, their interpretation of it during the definite term of three years would be entitled to great, if not controlling, influence in the decision of the question before us. But this is not all that is opposed to the plaintiff's present contention. He expressly consented in writing to the drilling of one of the producing wells, acquiesced in the drilling of the other, and received his share of the oil, in accordance with the provisions of the lease. During the definite term allowed for the development of the property, he permitted the lessees to drill these wells without an intimation of his present claim. If he then entertained the view of the lease which he now advances in aid of his suit, his silence was misleading, and the purpose of it fraudulent. He must have known that the lessees would not have drilled the wells under such an interpretation as he now insists upon, because it renders the time consumed and expenditures incurred in drilling them of no account

in determining their rights under the lease. It is an interpretation which makes the time and labor so expended operate as an extinguishment of these rights, and a development of the plaintiff's property without compensation to the parties by whom the development was accomplished. Surely, such results cannot be tolerated, unless there is a clear warrant in the lease for a construction which produces them. But there is no such warrant in the lease. The so-called "exception" or "reservation" is nothing more than a restriction upon the lessees' right respecting the location of wells on the 70 acres included in it. It is a stipulation that the lessor may designate the boundaries of "four acres around the buildings" within which the lessees shall not drill wells without his written consent. When such consent was given, and the work done under it resulted in the establishment of a well which produced oil in paying quantities, the effect of it upon the rights of the parties under the lease, was the same as if it had been drilled outside of the boundaries designated by the lessor. This is a construction which harmonizes with the understanding of the parties as manifested by their conduct during the definite term, and which, independent of their interpretation of their contract, best accords with the language and object of the instrument which defines their rights.

Judgment affirmed.

[1]LAST CHANCE MINING CO. v. TYLER MINING CO.

(157 U. S. 683. Supreme Court. April 15, 1895.)

When the course of a mineral vein is across a claim, instead of in the direction of its length, the side lines of the claim become, in law, the end lines, and the end lines become the side lines.

Extent of res adjudicata. When the jurisdiction of a controversy by a court is unquestioned, and the cause proceeds to final judgment, and no review is sought for, the judgment is conclusive upon the parties to the suit as to the matters decided, but not as to matters which might have been decided, but were not.

Survey amended after adverse filed. Effect of ex parte adjudication. An adverse claim was filed and suit brought to support it. The adverse and the complaint showed a surface conflict. Defendant appeared and filed answer. But before trial defendant amended its survey so as to draw in its end lines and shorten its claim so as to exclude all the conflicting area. Defendant then withdrew the answer and allowed plaintiff to proceed *ex parte* to judgment. The court took testimony; found affirmatively that plaintiff had the prior location and gave judgment for the conflicting area: *Held,*

(1) That it appeared by the record that the court had in that case passed upon and determined the question of priority of location, and upon such determination had given judgment in favor of the plaintiff:

(2) That the defendant's withdrawal of its answer did not operate to take the complaint out of the case, or the allegations of fact contained in it, or to prevent a judicial determination of those facts:

(3) That the abandonment of his claim by the defendant did not take the jurisdiction for the settlement of the question out of the hands of the court, or restore it to the land department.

Writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[1]*Resumé of the Last Chance Litigation.* This suit was ejectment brought by the Tyler against the Last Chance Co. After verdict for defendant the Tyler Co. appealed and the judgment was reversed. 54 Fed. 284. On the second trial there was a verdict for the plaintiff and its judgment on the verdict was affirmed in 61 Fed. 557, by the Circuit Court of Appeals.

On certiorari to the Supreme Court the text decision was given reversing the case.

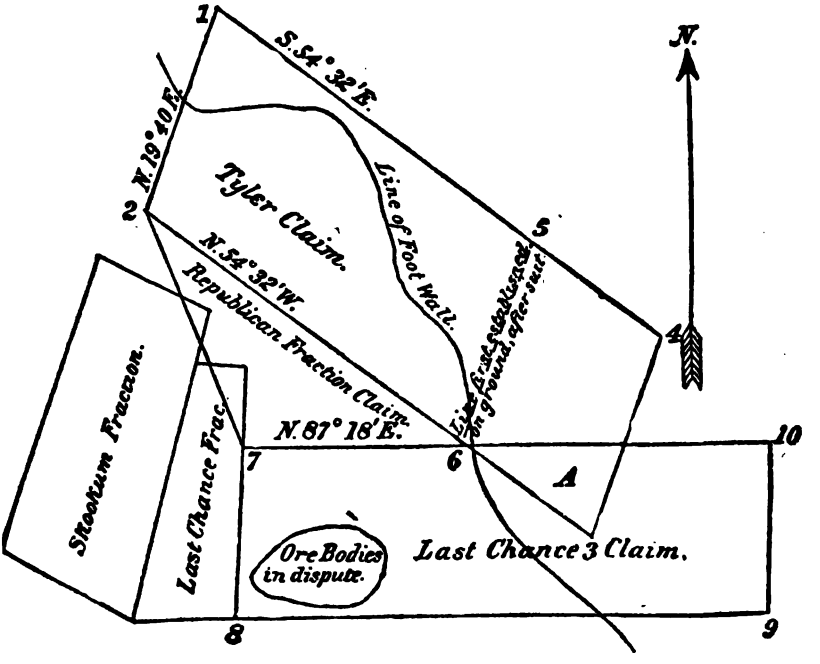
On August 8, 1891, the Tyler Mining Company brought its action in the circuit court of the United States for the district of Idaho to recover of the Last Chance Mining Company and others the possession of a certain portion of a mineral vein, as well as the value of the ores theretofore taken from the vein by the defendants. After disclaimer by two, and answer by the Last Chance Mining Company and other defendants, the case came on for trial. In this there was a verdict and judgment for the defendants. This judgment was reversed on error by the court of appeals of the Ninth Circuit, and a new trial ordered. 4 C. C. A. 329, 54 Fed. 284, and 7 U. S. App. 463. At the February term, 1893, of the circuit court for the district of Idaho, the new trial directed by the court of appeals was had, and resulted in a verdict and judgment for the plaintiff. On error to the court of appeals this judgment was, on April 2, 1894, affirmed (9 C. C. A. 613, 61 Fed. 557), whereupon, on application of the defendants, the case was brought to this court by writ of certiorari.

The following diagram, taken substantially from the first opinion of the court of appeals, fully illustrates the situation of the respective claims:

After the reversal *supra* it was submitted on agreed statement of facts and decided in favor of the defendant, the Last Chance, by the original trial court, 71 Fed. 848; 18 M. R. 303. This judgment was affirmed in 79 Fed. 277, under the style of *Tyler Co.* v. *Sweeney*.

Republican Co. v. *Tyler Co.* 79 Fed. 733; 18 M. R. 564, is a case between the Tyler lode outcrop and claimants on the same vein on the dip outside of the claim of the Last Chance lode.

The final result was to give the vein within its vertical planes to the Last Chance as against the Tyler, and to give the vein on the dip to the Tyler as against the Republican and two other fractions covering parts of the same vein.



The controversy is between the owners of the Tyler claim and those of the Last Chance claim. As appears from the diagram, the Tyler claim, as originally located (1, 2, 3, 4), conflicts with the Last Chance claim (7, 8, 9, 10) in the triangular piece marked "A." On April 19, 1887, the owners of the Tyler claim made application for a patent for the entire claim as thus originally located. To this application the owners of the Last Chance claim filed, under the authority of sections 2325, 2326, Rev. St., an adverse claim to the conflicting ground A, and thereafter commenced the required action in the district court of the First judicial district of Idaho territory. In that action the owners of the Tyler claim appeared and filed answer, but when the case

was called for trial the answer was withdrawn and a judgment entered in favor of the plaintiffs. No reason for this withdrawal appears in the record of the proceedings of the district court; but the testimony in this case shows that pending those proceedings the owners of the Tyler claim amended their application for purchase in the land department by excluding therefrom the territory marked on the diagram 3, 4, 5, 6, thus leaving their application only for the territory outside the boundaries of the Last Chance claim.

At the first trial in the circuit court the record of this judgment in the district court was admitted in evidence for the purpose of showing that the Last Chance claim had priority of location over the Tyler claim. On review in the court of appeals its admission was adjudged error, and by reason thereof the judgment of the circuit court was reversed. On the second trial in the latter court the record was again offered, but was excluded, and this ruling was sustained by the court of appeals.

According to the original location of the Tyler claim, the lode entered through an end line, (1, 2), but passed out through a side line, (2, 3), and did not touch the end line, (3, 4). Under the amended location it passed through two parallel end lines, (1, 2, and 5, 6). The amended application was accepted by the land office and a final certificate for the tract, with the reduced boundaries, was issued to the owners of the claim. Within the vertical planes of the end lines, (1, 2, and 5, 6), extended, the ore bodies in dispute are found; and, the dip of the vein being in that direction, it was held that the owners of the Tyler claim were entitled to follow the vein on its dip beyond the side line, (2, 6), and took these ore bodies as a part of the vein thus followed..

W. B. HEYBURN and C. S. VOORHEES, for plaintiffs in error.

ARTHUR BROWN and JOHN R. MCBRIDE, for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

The course of this vein is across the Last Chance claim instead of in the direction of its length. Under those circumstances, the side lines of that location become the end lines, and the end the side lines. *Mining Co.* v. *Tarbet*, 98 U. S. 463; *Argentine Min. Co.* v. *Terrible Min. Co.*, 122 U. S. 478, 7 Sup. Ct. 1356; *King* v. *Mining Co.*, 152 U. S. 222, 14 Sup. Ct. 510.

On the assumption that the action of the owners of the Tyler claim, in excluding from their application a portion of their claim, was legal, obviously the priority of location becomes a pivotal question; for, while the disputed ore is on the dip of the vein within the extended vertical planes of the end lines of the Tyler claim, it is also within the legal end lines of the Last Chance claim, and on the dip of the vein as it passes through that claim. Naturally, therefore, the controversy in the circuit court was upon the priority of location. The judgment of the district court in the adverse suit having been excluded from evidence, parol testimony was admitted for the purpose of determining this priority, and the question of fact arising on such parol testimony was settled by the jury in favor of the owners of the Tyler claim. Was the judgment of the district court in the adverse suit properly excluded? The law in respect to estoppel by judgment is well settled, and the only difficulty lies in the application of the law to the facts. The particular matter in controversy in the adverse suit was the triangular piece of ground, which is not the matter of dispute in this action. The judgment in that case is therefore not conclusive in this as to matters which might have been decided, but only as

to matters which were in fact decided. *Hopkins* v. *Lee,* 6 Wheat. 109; *Smith* v. *Kernochan,* 7 How. 198; *Pennington* v. *Gibson,* 16 How. 65; *Stockton* v. *Ford,* 18 How. 418; *Packet Co.* v. *Sickles,* 24 How. 333, 5 Wall. 580; *Parrish* v. *Ferris,* 2 Black. 606; *Cromwell* v. *County of Sac,* 94 U. S. 351; *Davis* v. *Brown,* Id. 423; *Russell* v. *Place,* Id. 606; *Campbell* v. *Rankin,* 99 U. S. 261; *Lumber Co.* v. *Buchtel,* 101 U. S. 638; *Stout* v. *Lye,* 103 U. S. 66; *Nesbit* v. *Independent Dist.,* 144 U. S. 610, 12 Sup. Ct. 746; *Johnson Co.* v. *Wharton,* 152 U. S. 252, 14 Sup. Ct. 608.

The action in the district court was brought in compliance with the express provisions of the act of congress. The jurisdiction of the court is unquestioned, and the parties to the controversy are the same. The question then is, what was in fact decided in that action? Turning to the complaint, we find that it states the boundaries of the Last Chance claim; alleges that on September 17, 1885, certain named parties duly located such claim, and that at the time of and prior to such location the ground described "was vacant and unoccupied, and a part of the public domain of the United States, and the mineral lands thereof." It further describes the particular acts which were done in making the location; avers the conveyance of the title by the locators to the plaintiffs; their continued performance of the necessary work; the application on April 19, 1887, of the Tyler Mining Company for a patent for the Tyler claim; the conflict between the two claims in respect to the triangular piece of ground; the filing of an adverse claim by plaintiffs; that "said adverse claim was duly allowed by the register of said land office, and all proceedings on said application for patent on the part of the claimants therefor were by the register ordered to be stayed until the controversy as to the right of possession shall have been settled by a court of competent jurisdiction;" and that the action was "brought in support of the protest and adverse claim so filed by the plaintiffs to determine the right

of possession of the tract of ground by metes and bounds last hereinbefore described." The prayer was that the plaintiffs "be adjudged to be owners of, and entitled to the possession of, the said tract of mining ground by metes and bounds last hereinbefore described as a part of the hereinbefore mentioned and described Last Chance mining claim," and for costs.

The scope of the answer filed by the owners of the Tyler claim is not disclosed. It only appears that, having filed an answer, they withdrew it. When the case came on for trial, the defendants not appearing, the plaintiffs, as the record shows, introduced evidence, oral and documentary. The court made certain findings of fact, which findings corresponded generally with the allegations of the complaint. Among them was this: "That at the time the said Tyler mining claim was located that portion of the ground so in conflict as aforesaid had been located as a part of the Last Chance mining claim, and was not subject to location by the locators of the Tyler mining claim." And as a conclusion of law it ruled "that the plaintiff above named, the Last Chance Mining Company, is the owner of the ground and a portion of the mining claim described in the complaint herein as in conflict between the said Last Chance mining claim and the Tyler mining claim, by virtue of a valid location of the said Last Chance mining claim made by John Flaherty, J. L. Smith, M. Carlin and John M. Burke on the 17th day of September, 1885, and that the plaintiff is entitled to the possession of the said ground so in conflict as aforesaid by virtue of such valid location."

Upon these findings and conclusion a judgment was entered, which recites: "Therefore, by reason of the law and premises aforesaid, it is ordered, adjudged and decreed that the Last Chance Mining Company, the plaintiff above named, is the owner of, and by virtue of a valid location of a mining claim called the Last Chance, made on the (17th) seven-

teenth day of September, A. D. 1885, by John Flaherty, J. L. Smith, M. Carlin and John M. Burke, is entitled to the possession and the right of possession of all that piece or portion of said mining claim in the complaint herein described" (here follows a description of the triangular piece, A), "containing an area of 1.474 acres of ground, and the plaintiff do have and recover the possession and right of possession of said premises from defendant, the Tyler Mining Company."

Thus it appears that the complaint alleges a priority of location, and upon that rests the right to recover. The existence of the Tyler location, as a location, is not challenged, either expressly or by implication. Indeed, the complaint proceeds upon the assumption of its validity. The findings are express as to priority, and contain no suggestions of any defect in the Tyler claim, or any fact in favor of plaintiff's right other than that of priority of location, while the conclusion of law and the judgment recite and adjudge a valid location of the Last Chance mining claim on September 17, 1885, and a right of possession by virtue thereof. Upon the record, taken as a whole, there can be no escape from the conclusion that the court determined the question of priority of location, and upon this rendered judgment for the plaintiffs. What is there to impeach this conclusion?

It is said that the statutes of Idaho do not provide for findings of fact in a case like this, and that, therefore, the recitals in such findings must be ignored. If it be true that the statutes of Idaho do not authorize findings of fact, it is none the less true that such findings are a declaration by the court of the matter it determines. Even if not conclusive as against all testimony, they are certainly very persuasive evidence of what the court did in fact decide. In *Lumber Co.* v. *Buchtel, supra*, the judgment relied upon as an estoppel was based upon a finding of a referee, and it was said: "This finding, having gone into the judgment, is conclusive as to

the fact found in all subsequent controversies between the parties on the contract. Every defense requiring the negation of this fact is met and overthrown by that adjudication." In *Legrand* v. *Rixey's Adm'rs,* 83 Va. 862, 877, 3 S. E. 864, it appeared that the pleadings and judgment left a doubt as to the precise matter decided. Reference to an opinion of the trial court, for the purpose of making certain that which otherwise was uncertain, was approved. We quote from the supreme court of appeals:

"In the case at bar the trial judge filed with the papers in the cause his reasons for his decision, which the decree itself shows was done for the express purpose of explaining his decision. This being the case, the opinion of the trial judge, thus referred to in the decree, becomes a part of the record, and may be looked to, and is even more reliable, to explain, in doubtful cases, what was in issue and what was determined, than mere extrinsic evidence to the same end. We do not mean that the mere opinion of the trial judge, which may happen to be in writing and copied into the record, constitutes a part thereof; but we do say that where the decree, as in this case, refers to the opinion of the trial judge in terms that make it clear that the object was to refer to it to explain what was determined, and the reasons therefor, then such opinion becomes legitimately a part of the record, and must be looked to, to explain what was in issue and what was determined by the judgment or decree in question. See *Burton* v. *Mills,* 78 Va. 468, at page 470."

But if we ignore the findings altogether, and look simply at the judgment and the complaint, this will appear: The single ground stated in the complaint upon which superiority of right is claimed is priority of location. A judgment for the plaintiffs upon such a complaint is necessarily an adjudication in favor of that priority of location. There is no other fact upon which it can rest. It is doubtless true, as suggested, that other questions may be litigated in an adverse

suit, but they can be litigated only when they are presented to the attention of the court by some appropriate pleading. The only pleading upon which the case passed to trial and judgment was the complaint, and in that, as we have seen, plaintiff's right to recover is rested upon the single fact of priority of location.

It is said that the defendants did not contest, that they withdrew their answer, and that there was only a judgment by default. But a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest.

The essence of estoppel by judgment is that there has been a judicial determination of a fact, and the question always is, has there been such determination? and not, upon what evidence or by what means was it reached? A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission. Suppose the defendant files a denial, and on the trial the only evidence is the testimony of a witness to an admission made by the defendant out of court, and upon such testimony the judgment is rendered. Is it any the less a judicial determination because resting simply upon proof of the defendant's admission, And yet, in principle, what distinguishes that case from this? In each the judgment is resting upon an admission of the party against whom the judgment is rendered, and does it make any difference in what form that admission is presented to the judge? In 1 Freem. Judgm. (4th Ed.) § 330, the author says, citing many authorities in support thereof: "Upon principle, we think that the denial of a fact subsequently judicially established ought not to impart to an adjudication any greater effect than if all the parties had expressly or impliedly admitted the fact to be beyond controversy when such adjudication was made, and this is the

view taken by the greater portion of the American courts." Among the authorities cited is *Nashville, C. & St. L. Ry. Co.* v. *U. S.*, 113 U. S. 261, 5 Sup. Ct. 460, in which a decree in equity by consent of parties was held to bar a subsequent suit on any claim included in the decree. Bigelow, in his work on Estoppel (page 77), closes a discussion of the question with this observation: "The meaning simply is that judgment by default, like judgment on contest, is conclusive of what it actually professes to decide as determined from the pleadings; in other words, that facts are not open to further controversy if they are necessarily at variance with the judgment on the pleadings." *Brown* v. *Mayor, etc.*, 66 N. Y. 385; *Blair* v. *Bartlett*, 75 N. Y. 150; *Nemetty* v. *Naylor*, 100 N. Y. 562, 3 N. E. 497; *Orr* v. *Insurance Co.*, 114 Pa. St. 387, 6 Atl. 696.

The withdrawal by defendants of their answer may have prevented any judicial determination as to the special facts set up therein in defense or avoidance of plaintiff's claim. *Finnegan* v. *Campbell*, 74 Iowa, 158, 37 N. W. 127. But such withdrawal was not operative to take out of the case the complaint, or the allegations of fact therein contained, or to prevent a judicial determination of those facts.

But, further, it is contended that the action of the owners of the Tyler claim in amending their application, coupled with the withdrawal of their answer, took them entirely out of the case in the district court. It is said that they had abandoned all claim to the property theretofore in controversy, that they were really no longer parties to the action, and that it remained simply a case pending between the owners of the Last Chance and the United States. Such seems to have been the view taken by the court of appeals when it held that the judgment was improperly admitted in evidence. We are unable to concur in this view. It may well be doubted whether the amendment filed in the land office had any force or effect during the pendency of the

action in the district court. Section 2326 provides that after the filing of the adverse claim "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." As said by this court in *Mining Co.* v. *Rose,* 114 U. S. 576, 585, 5 Sup. Ct. 1055, referring to the action of the officers of the department pending proceedings in court: "After the decision they are governed by it. Before the decision, once the proceeding is initiated, their function is suspended."

It is suggested by counsel that the abandonment by the owners of the Tyler location of any claim to the disputed territory was in effect a waiver of the adverse claim, within the language of the statute, on the happening of which the right of the land office to proceed was restored. But that is not within the letter, even if within the spirit, of the statute. The adverse claim is the claim made by the party opposing the application, and the party to waive a claim is the one who makes it. The obvious meaning is that when an adverse claim is filed—that is, a claim filed by some one opposing the application in whole or in part—the proceedings in the land office shall be stayed until the determination of the dispute by the court in which the action is brought, or the party who has presented such adverse claim shall have in some way waived his opposition to the application. There was no waiver on the part of the parties who filed this adverse claim, and the only way in which any waiver is claimed to have been made was by a proceeding on the part of the applicants in the land office, and every proceeding there was, as we have seen, directed to be stayed. It is doubtless true that if, notwithstanding the pendency of such an action, the land office accepts a reduced application for ground, no part of which is covered by the adverse claim, and in respect to which there is no opposition, and proceeds subsequently upon such

amended application to grant a patent, there is no one who can object, for the matter is one wholly of procedure between the United States and the applicant, and the former, by granting the patent waives any irregularity in the procedure.

But, whatever may have been the effect of the amended application of the owners of the Tyler claim in this respect, they were not thereby taken out of the jurisdiction of the district court; neither was the action in that court abated, nor was it left as one only between the owners of the Last Chance claim and the government. There is no provision in the statute for an action of this kind simply against the government. An applicant for public lands cannot have his right thereto, as against the government, determined by the courts in a suit against the latter. *U. S.* v. *Jones,* 131 U. S. 1, 9 Sup. Ct. 669. The only jurisdiction which the district court could have was of a controversy between individual claimants, and, though its judgment is by statute made conclusive upon the government, of the rights of the party in whose favor the judgment goes, it is none the less true that the condition of jurisdiction is a controversy between individual claimants. When an action has been instituted in the court to determine such a controversy, it is not within the competency of the defendant to take himself out of court. A defendant may withdraw his answer, and thus let judgment go by default, but he does not thereby deprive the court of a jurisdiction which has been once established. The rule applicable here is no different from that which applies in any other case. When a defendant has by personal service or appearance once been brought into a court having jurisdiction of the subject-matter, he cannot, at his election, oust the court of jurisdiction, or prevent the case from passing to judgment. Whether he confesses plaintiff's right, or defaults in answer, or files a denial or a disclaimer, is alike immaterial. In each and all of these cases the jurisdiction re-

mains, and the court may enter the appropriate judgment. Where the defendant simply withdraws his answer, as was this case, the court is under no obligation to inquire whether he has lost all interest, but may proceed to judgment; and its judgment is an adjudication of the rights of the plaintiff, as shown by the complaint and testimony. Can it for a moment be supposed that after the entry of this judgment the defendants, treating it as a nullity, could again amend their application so as to include all the ground covered by the original application, and thus the disputed territory, and, if such amendment were permitted by the land office, press the application to success, and obtain a patent for the entire claim? And yet, if the judgment be a nullity, and the defendants out of the district court, why might not this be done? The defendants, by the proceedings which they initiated in the land office, compelled the plaintiffs to institute a suit in a court of competent jurisdiction to enforce their rights. After such suit has been commenced, and the defendants have been made parties thereto, and the court has proceeded to judgment, will the defendants be heard to say that that judgment amounts to nothing? We are clearly of the opinion that this cannot be tolerated; that the judgment was in all respects regular; that it was conclusive as to the particular ground in controversy, and binding, by way of estoppel, as to every fact necessarily determined by it; and that priority of location was one fact so determined. There was error, therefore, in excluding the record of that judgment.

Our conclusions in this respect obviate the necessity of considering another very interesting and somewhat difficult question presented by counsel. It will be seen from the diagram that according to the original location of the Tyler claim the vein enters through an end and passes out through a side line, while by the amended location it passes in and out through end lines. Of course, if the latter is a valid location, the owner of the claim would unquestionably have

the right to follow the vein on its dip beyond the vertical plane of the side line. But if it were not, and the original location was the only valid one, has the owner the right to follow the vein outside any boundaries of the claim extended downward? It has been held by this court in the cases heretofore cited that where the course of a vein is across, instead of lengthwise of, the location, the side lines become the end lines, and the end the side lines; but there has been no decision as to what extra-territorial rights exist if a vein enters at an end and passes out at a side line. Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine, and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?

If the common-law rule as to real estate obtains in such a case, then, of course, on the original location the owners of the Tyler claim would have no right to follow the dip of their vein outside the vertical planes of any of its boundary lines; and even if the amended application was perfectly valid the question would arise whether the rights acquired under it related back to the date of the original location, or arose simply at the time of the amendment, in which case there would be no doubt of the fact that the owners of the Last Chance had by years a prior location. However, in the view we have taken of the other question, it is unnecessary to consider this.

For the reason given the judgments of the court of appeals and of the circuit court are

Reversed, and the case is remanded to the latter court with instructions to grant a new trial.

THE JUSTICE MINING CO. ET AL. v. LEE.

(21 Colorado 260; 40 Pac. 444. Supreme Court. May 20, 1895.)

[1]**The fact of alienage if raised at the proper time** by the proper person will defeat the application to purchase mineral lands from the government by an alien.

But after patent issued a third party cannot assert such alienage in the grantee and so defeat the patent. The fact of citizenship is to be conclusively presumed to have been found by the land department.

The courts will not interfere with the land office pending an application for patent, to control its action upon such matters where it has sole jurisdiction.

Appeal from the Court of Appeals.

This case was brought into this court by appeal from a judgment of the court of appeals rendered in the case of *Lee* v. *The Justice Mining Company,* at the April term, 1892. See opinion, 2 Colo. App. 112. The record consists of the complaint and a demurrer thereto, which are fully set out in the statement of the case preceding that opinion. The complaint is in substance as follows:

That the plaintiff Lee, on the 20th day of May, 1887, made a valid location of the Aftermath lode mining claim. That on the 8th day of October, 1885, Edwin Doust, being then and ever since an alien located the Justice mining claim. That this claim covers and conflicts, to the extent of 300 feet in width and 500 feet in length, with the ground included in the Aftermath location. That Doust, on the 13th day of October, 1885, entered into a contract to sell and transfer the Justice mining claim to one Lawson, also an alien, and on that date executed a deed without any consideration therefor

[1]*O'Reilly* v. *Campbell,* 116 U. S. 420. *Billings* v. *Aspen Co.* 52 Fed. 250. *Wilson* v. *Triumph Co.* 19 Utah 66; 56 Pac. 300. See notes *ante* p. 85.

to John W. Richards, who was a citizen of the United States, and solely for the purpose of having Richards procure a patent from the government. That concurrently with the deed, and in execution of the agreement to transfer the title to Lawson, Richards executed a title bond to said Lawson, whereby he agreed to convey to him the Justice mining claim, with other properties, for certain considerations therein named. That said Richards made application for patent, and on the 20th day of February, 1886, commenced his advertisement therefor. Said publication was completed on April 23, 1886. On the 30th day of April, 1886, The Justice Mining Company was organized and incorporated, with a nominal capital of $100,000; and on that day Richards executed a deed for the Justice mining claim for a nominal consideration to Joseph Ruse, as trustee for said company, which was recorded June 11, 1887. That the receiver's receipt was issued to Richards on June 14, 1887. Ruse thereafter conveyed the title held by him to The Justice Mining Company in consideration of 56,000 shares of the capital stock. That by reason of the foregoing facts the title to the ground in controversy by reason of his location of the Aftermath, became vested in plaintiff prior to the transfer by the trustee to The Justice Mining Company. That said receiver's receipt is a cloud upon his title, and asks that it, together with all the deeds mentioned, be canceled and held for naught. The court below sustained the demurrer to the complaint and dismissed the action at the cost of plaintiff. The court of appeals, by a majority opinion (Judge Bissell not sitting), reversed this judgment.

MR. A. W. RUCKER, for appellants.

MR. A. T. GUNNELL, for appellee.

MR. JUSTICE GODDARD delivered the opinion of the court.

We think the learned judge who delivered the opinion of the court of appeals was in error in assuming that the record in the case presented a question as to the right of an alien to acquire by location a transferable interest in a mining claim. That question, under the facts presented, could not be raised by the plaintiff. While it is true that the mineral lands of the government are open to location and purchase only by a citizen of the United States, or one who has declared his intention to become such, and the fact of alienage if raised at the proper time by anyone adversely interested, will defeat the acquirement of title thereto, yet the qualifications of an applicant for patent, as well as the fact of discovery and the compliance on his part with other requirements made essential by the act of congress to entitle him to purchase the mineral land of the government, being cognizable by the officers of the land department, when in the exercise of their jurisdiction they approve the application and allow an entry, the fact of citizenship, as well as all other questions of fact, is presumed to have been established, and is not open to review by the courts at the instance of third parties.

As was said by Justice Field, speaking for the court in *Steel* v. *Smelting Co.*, 106 U. S. 447:

"We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications

of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation."

It is now too well settled to admit of discussion, that after the "grant of title, or the equivalent, is made to an alien, it cannot be attacked by any third party." *Billings* v. *Aspen Co.*, 52 Fed. Rep. 250; *Governeur* v. *Robertson,* 11 Wheat. 332; *Craig* v. *Leslie,* 3 Wheat. 563.

If the right of a third party to attack the validity of a patent when issued, upon the ground of the alienage of the patentee, was a debatable question, it is clear that the present action was prematurely brought. At the time of its commencement the proceedings in the land office were yet pending, and that department had exclusive jurisdiction of the matter, and any attempt on the part of the courts to control its action would be an unwarranted assumption of jurisdiction, under the circumstances. In either view, this action cannot be maintained, and the demurrer should be sustained. The judgment of the court of appeals must therefore be reversed and the cause remanded, with directions to affirm the judgment of the district court.

Reversed and remanded.

WILLIAM BENNETT v. GEORGE HARKRADER.

(158 U. S. 441. Supreme Court. May 27, 1895.)

Rights by possession in Alaska. By the special Act creating Alaska land district, one then in possession of mining ground is protected the same as one who had made a complete location.

[1]**Certificate admissible though defective.** A location certificate however defective in form is under the above Act admissible in evidence to show when possession was taken and to point out the property which was taken possession of and (arguendo) should be admissible for such purposes everywhere.

Stating to the jury what the issue is, is of itself a proper instruction; and if further instructions were erroneously given or refused the complaining party must produce the record and disclose the error.

[2]**A general verdict is sufficient** in a suit supporting an adverse claim.

Error to the District Court of the United States for the district of Alaska.

William Bennett, for himself and as the administrator of M. Gibbons, deceased, having made application in the United States land office at Sitka, Alaska, for a patent to what is known as the Aurora lode mining claim, the defendant in error, George Harkrader, filed an adverse claim in that office, and subsequently, under the authority of Rev. Stat., sec. 2326, commenced in the district court of the United States for the district of Alaska, this action in support of such claim. After answer and reply, the case came on for trial and resulted in a verdict and judgment for plaintiff, to review which judgment the defendant sued out this writ of

[1]The original defective location certificate admissible in connection with the relocation certificate. *Duncan* v. *Fulton*, 15 Colo. App. 140; 61 Pac. 244.

[2]This decision being by the Court of Last Resort in the construction of the Mining Acts of Congress would seem to overrule or qualify previous state decisions requiring special verdicts such as *McGinnis* v. *Egbert*, 15 M. R. 329. *Manning* v. *Strehlow*, 11 Colo. 451; 18 Pac. 625. *Burke* v. *McDonald*, 17 M. R. 325.

error. The plaintiff was the owner of certain mining claims known as the Bulger Hill and Nugget Gulch placer mining claims. The description of the former in the complaint is as follows:

"Commencing at post No. 10 of the U. S. Survey, known and recorded as the Bulger Hill Survey, whence United States mineral monument No. 2, duly established by United States survey and recorded as a permanent monument, bears north seventy-six degrees (76°) east eleven hundred and seventy-eight (1178) feet; thence running north thirty-four degrees and forty-five minutes (34° 45′) east one thousand (1000) feet to angle No. 1; thence running south twenty-two degrees (22°) east two hundred (200) feet to angle No. 2; thence south forty-one degrees and thirty minutes (41° 30′) east five hundred and ninety-four (594) feet to angle No. 3; thence running south thirty-seven degrees and thirty minutes (37° 30′) west nine hundred and ninety (990) feet to angle No. 4; thence north thirty-six degrees and fifteen minutes (36° 15′) west seven hundred and thirty-seven (737) feet to place of beginning."

On the trial the plaintiff offered in evidence the following location certificate:

"Notice.—The undersigned claim five hill claims of two hundred feet each frontage and running back one thousand feet, thence running from a stake on the west bank of Ice gulch to a similar stake one thousand feet distant, near the mouth of Quartz gulch.

"April 6th, 1881.

"Tom Lieham,
"John Olds,
"Tom Kernan,
"Pete Bulger,
"Pat. McGlinchy,

"This company is known as the Bulger Hill Company.

"April 8th, 1881. "R. Dixon, Recorder."

This was objected to as incompetent and void for uncertainty, but the objection was overruled, and the location certificate admitted in evidence.

The court, among other instructions, gave the following:

"You have two ultimate questions to consider, and those only, namely:

"(1) Is the plaintiff the owner of the Bulger Hill and the

Nugget Gulch placer claims, and entitled to the possession of the soil included within them, and are they located on the grounds as he has described them? Or

"(2) Are the defendants the owners of the Aurora lode and entitled to the possession of the soil embracing it, and is it situated on the ground called for in the description in their answer?"

To the giving of which instructions the defendants duly excepted. The verdict of the jury was in these words: "We, the jury, find for plaintiff, R. S. Belknap, Foreman." The sufficiency of this verdict was challenged, but sustained by the court.

MR. JOHN H. MITCHELL, for plaintiff in error. (MR. M. B. GERRY and MR. D. A. MCKNIGHT were on his brief.)

MR. SAMUEL F. PHILLIPS, for defendant in error. (MR. H. W. BLAIR, MR. OSCAR FOOTE, and MR. F. D. MCKENNEY were on his brief.)

MR. JUSTICE BREWER delivered the opinion of the court.

The ruling of the court in admitting the location certificate is the first matter presented for our consideration. The ground of the objection is the uncertainty in the description. Section 2324, Rev. Stat., provides that

"The location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim."

It is obvious that the description is quite imperfect, and yet it does not follow therefrom that there was error in admitting the certificate in evidence. The description of the property found in the complaint was evidently prepared

with care and is apparently open to no objection. At least none has been suggested by counsel. But the record shows that testimony was introduced on behalf of the plaintiff connecting the description in the certificate with that in the complaint, and tending to show that the property described by the one is that described by the other; and also that the mining claim was located and staked on its boundaries as the law and the miners' rules and regulations of that district required. Conceding the indefiniteness of the description in the certificate, it does not follow that it is absolutely void, for as said by this court in *Hammer* v. *Garfield Mining Co.*, 130 U. S. 291, 299, after quoting from section 2324: "These provisions, as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course the section means, when such reference can be made. Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification."

But whatever may be thought of its imperfections, the rights claimed by plaintiff by virtue of the attempted location are protected by the legislation of congress. In 1884, after the location of this mining claim and prior to the commencement of this action, congress passed an act in reference to Alaska, act of May 17, 1884, c. 53, 23 Stat. 24, in which are the following provisions:

"Sec. 8. That the said District of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka.

* * * * * *

"And the laws of the United States relating to mining claims and the rights incident thereto shall from and after the passage of this act be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President:

"*Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress;

"*And provided further*, That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid;

* * * * * *

"But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

This guarantees not only to parties who have located mining claims under the laws of the United States, but to those who have occupied and improved or exercised acts of ownership over such claims the right to perfect their title. Obviously the purpose of congress in this act was to secure to those parties who were in actual possession of mineral claims in the Territory of Alaska the privilege of acquiring full title thereto, and this notwithstanding their failure to take all the steps required by the general mining laws of the United States with reference to the location of such claims. It was to be expected that, owing to the primitive condition of things in the Territory, in the absence of a government survey, and perhaps of persons competent to make accurate surveys, many irregularities and imperfections would exist, and congress intended that the possessor should be secured in his possession and be permitted to perfect title to the property possessed. Such being the clear import of the statute, it was perfectly proper to introduce the location certificate, however defective in form, for the purpose of showing the time when the possession was taken, and to point out so far as it did the property which was taken possession of. The same observations may be made in reference to the other location certificates offered in evidence.

So far as respects the two instructions complained of, it cannot be doubted that they are correct statements of the law. The two ultimate questions for the jury were as stated. Indeed, the argument of defendant's counsel is rather to the effect that other instructions should have been given and the case not left unexplained, as it would seem to be by these. It is sufficient to say in reference to this line of argument that the record does not purport to contain all the instructions. It is to be assumed, if others were needed, as doubtless they were, to fully present to the jury the subordinate questions, that they were given; and, further, if no such instructions were given, it is generally true that a party, who thinks an instruction in respect to any matter ought to be given, must ask for such instruction, and failing to ask for it will not be heard in a reviewing court to allege that there was error in the want of it. The record shows that the defendant did ask some instructions which were refused, but as it is practically conceded by counsel that they contained matter inappropriate to the issue on trial, we need not stop to inquire whether the court committed any error in failing to give them.

The remaining question is as to the verdict, which is simply "for plaintiff." By the seventh section of the act of congress of May 17, 1884, heretofore referred to, 23 Stat. 24, it is provided that "the general laws of the State of Oregon, now in force, are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or of the laws of the United States." The statute of Oregon (1 Hill's Annotated Laws of Oregon, p. 380, sec. 320) requires the jury in an action for the possession of real estate to find as follows: "First, if the verdict be for a plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof or some undivided share or interest in either, and the nature and duration of his estate in such prop-

erty, part thereof, or undivided share or interest in either, as the case may be."

The verdict in this case does not state, in terms, that the plaintiff is entitled to the possession of the property described in the complaint, or any part thereof; neither does it state the nature or duration of his estate in the property. Hence it is insisted that the verdict was irregular, and that no judgment should be rendered thereon, and in support thereof the cases of *Jones* v. *Snider,* 8 Oregon, 127, and *Pensacola Ice Co.* v. *Perry,* 120 U. S. 319, are cited. We do not think the defect, if it be one, is sufficient to vitiate the judgment. Where the complaint alleges that the plaintiff is entitled to the possession of certain described property, which is unlawfully detained by the defendant and the possession of which the plaintiff prays to recover, a general verdict for the plaintiff is a finding that he is entitled to the possession of all the property described in the complaint. Again, in this action, brought under a special statute of the United States in support of an adverse claim, but one estate is involved in the controversy. No title in fee is or can be established. That remains in the United States, and the only question presented is the priority of right to purchase the fee. Hence the inapplicability of a statute regulating generally actions for the recovery of real estate, in which actions different kinds of title may be sufficient to sustain the right of recovery. It would be purely surplusage to find in terms a priority of the right to purchase when that is the only question which can be litigated in such statutory action. If the plaintiff owns the fee he is not called upon to file an adverse claim or commence such an action, and the statute providing therefor has no application. *Iron Silver Co.* v. *Campbell,* 135 U. S. 286.

These are the only questions presented. In them we find no error and, therefore, the judgment is

Affirmed.

ARIE E. STAHL v. GEORGE H. VAN VLECK.

(53 Ohio St. 136; 41 N. E. 35. Supreme Court. June 11, 1895.)

Selection of tract. A party of the first part, being the owner of three adjoining tracts of land, each containing forty acres, leased one acre thereof, to be designated by himself, to a party of the second part and in the lease it was "agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate forty acres of the balance of said premises on the same terms as above." *Held*, that the forty-acre tract out of which the one acre was thereafter selected by party of the first part is the forty acres to be operated under the contract. *Walsh* v. *Ringer*, 2 Ohio 328. *Cunningham* v. *Harper*, Wright 366, and *Hay* v. *Storrs*, Id. 711, followed and approved.

Sinking test well good consideration. In said contract it was further "agreed that, if second party or their assigns do not commence a test oil or gas well at Rising Sun or vicinity in ninety days, this lease to be void." *Held*, that a test well at that place having been commenced and completed in ninety days, whereby the existence of oil at that point was ascertained, such performance supplied a sufficient consideration for the contract of lease, even though the test well was immediately plugged and casing withdrawn.

No second selection. The party of the first part having selected the one acre upon which such well was to be drilled, and the second party having acted thereon, the first party is bound thereby, and has no right to make a second selection.

[1]**Enjoined time of lessee made good.** It being agreed that such lease should "continue and be in force for five years from the date thereof," and the second party, having commenced operations in good faith to drill for oil in ample time to complete a well within said term of five years, was wrongfully enjoined by the lessor, and the injunction kept alive until after the expiration of the term of five years: *Held*, that the second party is entitled at the close of the litigation to as much time in which to perform his contract as still remained of his term when he was first enjoined. (Syllabus by the Court.)

---

[1]Compensation in damages. A corporation maliciously and without probable cause obtained an *ex parte* injunction enjoining mining by defendants; afterwards suit dismissed. *Held*, that an action lay

Error to Circuit Court, Wood county.

Action by Arie E. Stahl against George H. Van Vleck. From the judgment rendered, plaintiff brings error. Affirmed.

The controversy between the parties arose out of a duly-acknowledged written instrument, which was recorded in the records of Wood county, in the words and figures following:

"Contract executed this 15th day of December, A. D. 1886, by and between Arie E. Stahl, of Wood county, Ohio, as first party, and C. W. Manahan, Jr., and A. K. Detwiler, of Toledo, Ohio, witnesseth: That the said first party, for the consideration hereinafter stipulated and agreed upon, does hereby grant to said second parties, or their successors and assigns, the right to enter upon the following lands and premises now owned by said first party and situated in Perry township, Wood county, Ohio, to wit:

"A tract to be designated by first party of one acre on the following described premises: The south half of the northeast quarter of section two (2), in town three north of range twelve (12) east; also the northeast quarter of the southeast quarter of said section two, in township and range aforesaid, containing forty acres of within described premises,—for the purpose and with the exclusive right in and upon said premises to drill and develop oil, gas, and other valuable substances, and the exclusive right of way to said second party, or their successors and assigns, to convey over, upon, and through said premises any and all oil, gas and other valuable substances.

for malicious prosecution, and that all circumstances, even including the amount of profit which might have been made, were admissible to enable the jury to assess a just measure of damages. *Newark Coal Co.* v. *Upson*, 40 Oh. St. 17; and see *Wright* v. *Ascheim*, 5 Utah 480; 17 Pac. 125.

"In consideration whereof, it is hereby agreed: First—If oil be found and developed upon said premises in paying quantities, the said first party is to receive as his royalty the one-eighth part thereof of the oil in pipe lines to credit of first party, at the well. Second—Should gas be found and developed upon said premises, said first party is to have the right to use and consume, for lighting and heating his dwelling, such amount as may be necessary therefor, and the additional sum of three hundred dollars per annum for each gas well, when and as soon as the same is marketed and utilized. Third—From and after the expiration of twenty-four months from the date hereof, and until second party enter upon said premises and exercise the rights and privileges hereby granted, the said second party will pay to said first party, during the continuance of this contract, the sum of fifty cents per acre per year, upon each acre herein contracted for, to be paid out of the first moneys realized or received by said second party from the development of gas or oil.

"It is further agreed by and between said parties, their successors and assigns, that this contract and the rights and privileges therein granted and conferred shall continue and be in force for five years from the date hereof, or so long as oil, gas, or other valuable substances be found and developed upon said premises in paying quantities.

"It is also agreed that the second party or their successors and assigns shall have the right and privilege of necessary roads to and from all wells or mines developed upon said premises, and the right to remove all machinery, fixtures and buildings placed by them upon said premises.

"It is further agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second

party shall have the right to operate the balance of said premises on the same terms as above.

"In case said second party, its successors and assigns, shall not commence operations upon said premises within five years from the date hereof, then this contract shall be void.

"It is agreed that if said second party, or their assigns, do not commence a test oil or gas well at Rising Sun or vicinity in ninety days, this lease to be void.

"Signed and executed by the parties hereto, the day and year first above written. Arie E. Stahl. C. W. Manahan. A. K. Detwiler.

"Signed and executed in the presence of G. H. Baker, L. C. Winchell."

By the assignments duly recorded, this contract became the property of defendant in error, George H. Van Vleck.

On the 8th day of August, 1891, plaintiff in error, also plaintiff below, filed his petition in the court of common pleas, seeking to enjoin defendant from going upon said premises, erecting any derrick, placing any timber thereon, drilling any wells, or removing any oil or gas therefrom, and for a reformation of said agreement, its cancellation, and for equitable relief.

This injunction and relief was sought upon the alleged ground that the conditions of said instrument had not been performed, and no rental had been paid, no test oil or gas well had been commenced at Rising Sun or vicinity within the time specified; that no consideration was paid for said contract; that the same was without consideration; that only 40 acres of land were included in the contract, but by mistake the whole 120 acres were included in the written instrument; that said instrument was not acknowledged; and that the same is a cloud upon his title.

The defendant, by his answer, averred that the test well at Rising Sun was commenced and drilled to completion within 90 days from the date of said contract; that thereby it was

demonstrated, at great expense, that oil does exist in said lands; that he was about to drill a well on plaintiff's lands, and offered to pay any rental due under said contract, when stopped by this suit; and asks to be protected in his rights, and for other proper relief.

After trial in the common pleas, the case was appealed, and, on trial, the circuit court made the following finding of facts and law: "That on the 15th day of December, A. D. 1886, the plaintiff, Arie E. Stahl, executed and delivered to C. W. Manahan and A. K. Detwiler the written contract, or oil lease, a true copy of which is set forth in the answer of the defendant, George H. Van Vleck, herein, except the next to the last stipulation. Said stipulation, being the second one above the words 'signed and executed,' etc., when said contract was executed and delivered, read as follows, to wit:

" 'It is further agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract or on lands adjoining the same premises, of which the foregoing one acre described embraces a part, said second party shall have the right to operate '40 acres of' the balance of said premises on the same terms as above.'

"The court finds that in the said contract, as originally executed and delivered, the words '40 acres of' were interlined at the place where they occurred, and that the recorder in recording said instrument overlooked the interlineation, which had become somewhat blurred and obscure, so that the said contract or instrument appears upon the record precisely as set forth in defendant's answer, or rather as set forth in the exhibit which defendant has attached to his answer herein; but the said clause as it appears in said answer and in the record should be corrected and reformed so as to contain the words '40 acres of,' in order to conform the same to the instrument as it was when executed and delivered; that said lease when executed and delivered did not

confer upon the defendant the right to operate the whole of the farm in case gas or oil was found on the one acre designated in the lease, but upon only 40 acres thereof, if gas or oil was so discovered, and was so interlined in the original instrument, which was assigned to Van Vleck, and taken into his possession at the time of his purchase thereof.

"And the court further find that said contract of lease, by written assignments duly made and acknowledged, has been transferred to, and now belongs to, the defendant, George H. Van Vleck; that by virtue of such assignment the defendant, George H. VanVleck, has become entitled to all of the rights and privileges granted and conveyed by said lease to the original grantees, C. W. Manahan and A. K. Detwiler; that the said George H. Van Vleck was not aware when he purchased said lease that any error had intervened in the record thereof, nor did he have personal knowledge that the words '40 acres of' were in the said lease or instrument (although they had been interlined therein at the time of its execution) until the day of the trial of this cause in this court; that said George H. Van Vleck purchased said lease in good faith, and paid a valuable consideration therefor.

"And the court also find that Manahan & Detwiler, the original grantees in said lease, commenced a test well in the vicinity of Rising Sun within 90 days after the execution of said contract of lease, and in accordance with the terms thereof; that said well was not situated on plaintiff's land, and was about one and one-half miles therefrom; that said Manahan & Detwiler in due time drilled said well down to the oil-bearing rock, and for a sufficient distance therein to determine the character of the land; that oil was found in said well, and the existence of a deposit of oil at that point was ascertained; that, immediately after the completion of the drilling of the well as aforesaid, the said Manahan & Detwiler plugged the said well, drew the casing, and did not

further operate the same; that said lease was assigned to and became the property of defendant, Van Vleck, on the 30th day of March, A. D. 1887; that no operations were commenced by any one, unler said lease upon the lands of plaintiff, until about two weeks previous to the commencement of this action, and no rent was paid thereon; that, at the date last aforesaid, the defendant, through one Graham, his agent, requested the plaintiff to designate the acre of land upon which he desired to have a well located; that plaintiff thereupon designated a location for said well upon the southwest quarter (¼) of the northeast one-fourth (¼) of section 2, mentioned in petition; that pursuant to such designation by plaintiff, and prior to the commencement of this action, defendant in good faith, and with the intent to drill for oil under said lease, commenced placing material at the point so designated for the purpose of drilling; that soon afterwards the plaintiff notified the defendant's agent that he had changed his mind, and that, if any of said land was to be operated for gas and oil, he desired to have the operations begun, and carried on, upon the tract of 40 acres described as the northeast quarter of the southeast quarter of section two (2), town three (3) north, range (12) twelve east, in Wood county, Ohio; that, soon after receiving said notice, the agent of the defendant drew other loads of derrick lumber, and deposited it on the 40-acre tract so as aforesaid first designated by the plaintiff, and was about coming on the same land with another load when the plaintiff informed him that if the defendant insisted that his said lease gave him the right to operate the whole farm, which contained 120 acres of land, in case he was successful in finding gas or oil on the premises, that he would not permit him to commence operations upon said land at all, but would enjoin him. To this the agent of the defendant answered that he did not know how much land the defendant claimed a right to operate, but would write to the defendant, and let the plaintiff know,

and then deposited another load of lumber prepared for the purpose and intended to be used in the construction of a derrick on the land last mentioned and first designated by the plaintiff. The defendant at that time claimed a right under his said lease to operate the whole farm of one hundred and twenty acres in case he found gas or oil upon any one acre of land mentioned in the lease and designated by the plaintiff, and supposed that this right was vested in him by the terms of his lease. No other work or operation had been commenced or done on said land up to the date of the commencement of this action, and nothing has been done since. Upon the facts so found, the court find the equity of this case to be with the defendant, George H. Van Vleck, as to the forty-acre tract, described as the southwest quarter of the northeast quarter of section two (2), town three (3) north, range (12) twelve east, in Wood county, Ohio, and with the plaintiff as to the eighty acres, constituting the balance of the tract or farm described in the petition, and that each is entitled to have his title quieted accordingly. It is thereupon ordered, adjudged, and decreed by the court that the defendant, George H. Van Vleck, have and hold the right to enter upon and operate for gas and oil upon the forty-acre tract described as the southwest quarter of the northeast quarter of section two (2), town three (3) north, of range twelve (12) east, in Wood county, Ohio, in all respects as granted and conferred by the contract or oil lease set forth in defendant's answer herein, and as claimed in said answer, free from all interference of plaintiff herein; and that, as to the balance of the tract described in plaintiff's petition herein, the title of plaintiff thereto is quieted, and defendant is forever enjoined from asserting any rights or claims thereon by virtue of said oil lease or otherwise. And it is further ordered that each party pay one-half of the costs in both courts in this case to be taxed." Proper exceptions

having been noted, a petition in error was filed in this court seeking to reverse the judgment of the circuit court.

DODGE & CANARY, for plaintiff in error.

JAMES O. TROUP, for defendant in error.

BURKET, J. Plaintiff in error urges that the contract is void as to all except the one acre, for the reason that it is said to be indefinite and ambiguous, and that there is no description of the forty acres sought to be conveyed.

In Texas it is held that a grant by the owner of a certain number of acres in a particular tract will authorize the grantee to locate it in any part of the tract. *Wofford* v. *McKinna*, 23 Tex. 36.

In Illinois such a description is held to be so vague and uncertain as to convey no title. *Shackleford* v. *Bailey*, 35 Ill. 391; *Laflin* v. *Herrington*, 16 Ill. 304; *Hughes* v. *Streeter*, 24 Ill. 647.

In this state, at an early day, courts undertook to carry out the intention of the parties, and held that a deed conveying a certain number of acres out of a designated corner of a certain tract of land was a good conveyance of that number of acres in a square form out of the designated corner; and this was carried so far as to hold that a grant of 51 acres in the northeast part of a certain tract was good as a conveyance of 51 acres in a square form in the northeast corner of the tract. *Walsh* v. *Ringer*, 2 Ohio, 327; *Cunningham* v. *Harper*, Wright, 366.

In *Hay* v. *Storrs*, Wright 711, there was excepted out of a conveyance of a tract of land half an acre opposite where Mr. Harvey formerly resided. The exception was held good and sufficiently definite to enable an officer to find and locate it. The court say: "There can be no doubt of the intention

of the grantor to reserve to himself, by exception from his deed, one-half an acre. Where does it lie? Find where Harvey lived—if it be opposite the corner of the 134-acre tract, it lies in the corner, in a square form. If so far from the corner that the lines of the half acre would not reach it in a square form, then a line from the center of the residence of Harvey would be the center of the half-acre tract on the street, and the tract would be laid out in a square form by parallel lines, making that the base."

Plaintiff in error owned three tracts of forty acres each, and, by selecting the one acre upon which the well was to be drilled, he thereby designated that the forty-acre tract out of which the one acre was so selected should be the forty acres to be operated under said lease in case gas or oil should be obtained.

If the number of acres contracted to be operated in case gas or oil shall be found is the same as a sub-division of a section, say, 10, 20, 40, 80, or 160 acres, it will be held that the subdivision of the section upon which the well is located is the land intended to be operated under the lease. Otherwise the land to be operated is to be taken in a square form with the well as its center, unless the well is so near a line of the land as to make this impossible, in which case the land to be operated will be in a square form including the well, and extending to such line.

If gas or oil is found on adjoining lands, the tract to be operated must be ascertained in the same manner in which the half acre was ascertained in *Hay* v. *Storrs, supra.*

Next, it is urged that the contract was void, and remained so to the time of the commencement of the action, for the reason that upon its face it is without consideration. The contract is expressed to be upon the consideration thereinafter stipulated and agreed upon. There are many stipulations and agreements thereinafter contained, founded, however, upon

the contingency that oil or gas be found and developed upon said premises. There is also a stipulation to the effect that, if operations upon said premises be not commenced within five years, the contract shall be void. There is also an agreement that, if the second party shall not commence a test oil or gas well at Rising Sun or vicinity in 90 days, the lease shall be void. So far the stipulations and agreements are contingent, but there is a further and positive agreement, to the effect that after 24 months the second party will pay to the first party the sum of 50 cents per acre per year, "to be paid out of the first moneys realized or received by said second party from the development of gas or oil" not from the development of gas or oil on these premises, but from the development of gas or oil generally. Such a promise made by a party in the gas or oil business is as certain as the promise of a farmer to pay out of his next year's crops.

But, aside from this agreement to pay 50 cents per acre, the contingent stipulations and agreements, with part performance, and an offer of full performance before the commencement of the action, furnish ample consideration for the contract. Grant that the parties of the second part were not originally bound to commence a test oil or gas well at Rising Sun within 90 days, yet having commenced the well within that time at that place, and in that regard performed their part of the contract, such performance is itself a sufficient and completed consideration, and thereafter the lessor cannot be heard to aver want of consideration. Performance by the party not originally bound supplies the consideration, and thereafter the other party is as fully and firmly bound as he would have been in case there had originally been ample consideration expressed in the contract. *Fishmongers' Co.* v. *Robertson*, 5 Man. & G. 131; *Phelps* v. *Townsend*, 8 Pick. 392; *Commercial Bank* v. *Nolan*, 7 How. (Miss.) 508; 1 Pars. Cont. 451.

Again, it is urged that there was a lack of performance

as to the drilling of the test well at Rising Sun within 90 days. The circuit court found that the test well was commenced within 90 days, duly drilled to completion, and the existence of oil at that point thereby ascertained, that the well was not operated, but was plugged, and the casing withdrawn. This fully complied with the terms of the contract. The lease did not stipulate for the operation of the well, and the court cannot make a better contract for the plaintiff than he made for himself. As the test well was not on plaintiff's land, he had no interest in the profits to be derived from its operation, unless it should have been indirectly, and such indirect benefits arising from operations upon the lands of another, to be available, must be expressly stipulated for, as they cannot be implied.

Lastly, it is urged that, under the circumstances of this case, plaintiff should have had the privilege of making a second location of the place for the drilling of the well on his land, and that, as the five years had elapsed at the time of the trial, the lease had expired by its own limitation, and judgment should have been given in favor of plaintiff. As a general rule, only one location is permitted, and we see nothing in this case to warrant a departure from this rule. The defendant had commenced acting upon the selection made, and he had a right to insist that there should be no change. If a second selection had been granted, a third might have been demanded. The circuit court was right in holding him to his first location.

As to the expiration of the five years, the rule is that, where a party is prevented from performing his contract by injunction wrongfully obtained, he shall, at the end of the litigation, have as much time in which to perform as still remained at the date of the injunction, the rights thereafter to be the same as they would have been in case no injunction had been issued. In short, the time between the issuing of the wrongful injunction and the ending of the litigation is

not regarded and cannot be counted to the detriment of the enjoined party. To hold otherwise would permit a man to profit by his own wrong. This principle has been carried so far as to estop a party from availing himself of the statute of limitations. *Treasurer of Brown County* v. *Martin,* 50 Ohio St. 197, 33 N. E. 1112.

But it is urged that as defendant in error claimed the right to operate all of the three 40-acre tracts in case oil or gas should be found, when in fact he was entitled to operate only one of them, that he was in the wrong in his claim, and that, for aught that appears, the injunction would not have been applied for or granted in case he had claimed only 40 acres.

The findings of fact show that defendant in error did not know of this interlineation as to the 40 acres, and supposed that he was entitled to the whole 120 acres, as shown by the record. Plaintiff in error had full knowledge of the fact that only 40 acres were granted, and he was first in the wrong by making his claim for an injunction too broad. Had he truly stated the facts in his petition as to the 40 acres, and thus called the attention of defendant to the error in the record, it is not likely that any defense would have been made, and the well would have been drilled within the five years. The litigation and consequent delay were therefore caused by plaintiff in knowingly and wrongfully covering too much territory by his injunction, and not by the defense thus made without knowledge of the mistake in the record. There is therefore nothing to take the case out of the general rule in such cases.

Judgment affirmed.

CHARLES CRAW v. FRANK WILSON.

(22 Nevada 385; 40 Pac. 1076. Supreme Court. July 26, 1895.)

[1]**Prospecting contract held within the statute of frauds. A partnership agreement to locate mining claims being within the statute of frauds (St. 1861, p. 11, § 55), one partner cannot claim an interest in a claim located by another under an oral agreement that they should be partners in all such locations, there being no sufficient proof that the locations were made with partnership capital.**

Appeal from District Court. Lincoln county; A. E. Cheney, Judge.

Action by Charles Craw against Frank Wilson. From a judgment for defendant, plaintiff appeals. Affirmed.

GEO. SAWYER and RICHARDS & MACMILLAN, for appellant.

HENRY RIVES and T. J. OSBORNE, for respondent.

BELKNAP, J. This is a suit in equity for the purpose, among other things, of obtaining a decree determining that plaintiff is a half owner with defendant in certain mining property standing in the name of defendant. The case was tried by the court without a jury. The decision was in favor of defendant.

The complaint alleges that, in consideration of the mutual advantages to be derived therefrom, the parties promised and agreed to and with each other to combine their efforts and means in prospecting for and locating water rights, timber claims, and mines and mining claims, and that they should

[1] *Rice* v. *Rigley* (Idaho) 61 Pac. 290. Contra *Raymond* v. *Johnson*, 17 Wash. 232; 19 M. R.—. *Meylette* v. *Brennan*, 20 Colo. 242; 38 Pac. 75. *Hirbour* v. *Reading*, 11 M. R. 514. *Murley* v. *Ennis*, 12 M. R. 360.

be equal partners in all such locations; that said agreement has never been annulled in any way, but still remains in full force and effect.

The answer denies the partnership; admits defendant's ownership in the mines, but denies that such ownership was acquired by virtue of any agreement of partnership, or by the aid of any means, tools, or equipments furnished by the partnership, and alleges that defendant's interest was acquired entirely independently of it. The facts, so far as material to the contention, are that the parties formed a mining partnership by oral agreement, and under it some mining locations were made, and other property acquired.

These matters were of small value, and all of them had been settled long prior to the commencement of this suit. If there was anything left out, it was, according to appellant's testimony, the Hidden Treasure claim, called in the complaint, by mistake, the "Keystone Claim." No effort was made to amend the complaint so as to embrace the Hidden Treasure claim, probably because no value was attached to it, and it was afterwards relocated by a stranger. In the spring of 1892 the defendant went to the Ferguson mining district, and, in connection with others, located the property in dispute.

The important question is whether the Ferguson district mines were located under the partnership. Unless partnership capital was employed in their acquisition, the partnership agreement is within the statute of frauds, and void. The statute declares: "Sec. 55. No estate or interest in lands other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same, or by his lawful agent, thereto authorized in writing." St. 1861,

p. 11. Equitable relief may be given against the partner holding the legal title when the property has been acquired by partnership capital upon the theory that a resulting trust exists,—a trust arising by operation of law, and within the exception of the statute. Colly Partn. § 135, and note; *Edgar* v. *Donnally*, 2 Munf. 387; *Sigourney* v. *Munn*, 7 Conn. 11. The district court, however, in its decision, under conflicting testimony, held that the mines were not located with partnership capital, and enforced its conclusion by many circumstances in its support. Under well-settled rules, we cannot disturb the finding, but take this occasion to approve of it, as being fully supported by the evidence.

A number of exceptions were taken to the admission of evidence touching the dissolution of the partnership. The admission of this evidence could not have prejudiced the appellant, as the decision against him, as we have seen, was placed upon other grounds.

The judgment and order of the district court are affirmed.

JOHN VIETTI v. JAMES NESBITT ET AL.

(22 Nevada 390; 41 Pac. 151. Supreme Court. July 31, 1895.)

Miners and mill men not partners. The defendants, with others, were owners of a mine which was being worked by the plaintiff under an agreement that the ore extracted should be worked in a mill belonging to defendants, and the proceeds divided as follows: The defendants to be paid $25 per ton for milling; the plaintiff was then to be paid the expense of extracting the ore; the balance was to be divided equally between him and the owners of the mine. *Held*, that these parties were simply tenants in common of the ore and its proceeds, and no partnership existed between them.

Facts found by the trial court upon conflicting evidence are conclusive upon appeal.

Parol evidence admitted without objection. Where parole evidence of the contents of a written agreement is admitted without objection, no advantage of the fact of its incompetency can be taken afterwards. Under such circumstances the parol evidence is competent to establish what the terms of the contract were.

Moisture in other like ore. Upon a question of the amount of moisture contained in the ore, evidence of the amount found in other ore taken from the same ore body and worked under similar circumstances, is relevant.

Assay value. Where by the agreement the mill men were to return a certain per cent of the "assay value" of gold ore worked in the mill, this meant the standard assay value of gold as known everywhere, and not the value of gold bullion at the place where produced.

Interest, as such, can only be collected where authorized by statute. In an action upon contract, where there has been no settlement and the balance due upon the contract is uncertain and unascertained, interest cannot be collected. *(Syllabus by Bigelow, C. J.)*

Agreement for partnership must have consideration. *Trayes* v. *Johns*, 11 Colo. App. 219; 19 M. R.—.

Working co-tenants are partners. *Childers* v. *Neely*, 47 W. Va. 70; 19 M. R.—.

Parties to prospecting contract are not generally partners. *Hartney* v. *Gosling;* (Wyo.) 68 Pac. 1118.

Agreement to obtain lease and work as partners does not constitute a partnership before lease acquired. *Meagher* v. *Reed*, 14 Colo. 335; 24 Pac. 681.

Appeal from judgment and order overruling motion for new trial from District Court, Lincoln county; G. F. Talbot, District Judge.

The facts sufficiently appear in the opinion.

GEORGE S. SAWYER and RICHARDS & MACMILLAN, for appellants.

T. J. OSBORNE and HENRY RIVES, for respondent.

By the Court, BIGELOW, C. J.

Facts held sufficient proof of mining partnership. *Hurd* v. *Tomkins*, 17 Colo. 394; 30 Pac. 247. *Perkins* v. *Peterson*, 2 Colo. App. 242; 29 Pac. 1135. Facts held insufficient. *Hodgson* v. *Fowler*, 7 Colo. App. 378; 43 Pac. 462. *Caley* v. *Coggswell*, 12 Colo. App. 394; 55 Pac. 939.

Plaintiff was to receive so much per foot for boring an oil well and one-eighth interest in the leases held by defendants and to bear one-eighth the expenses. *Held*, to create a partnership and that he could not recover his footage without a previous settlement. *Kifer* v. *Smyers*, (Pa.) 15 Atl. 904.

An agreement between a corporation and an individual for the expenditure of money in developing company's mines, does not constitute a partnership. *Horton* v. *New Pass Co.* 21 Nev. 184; 27 Pac. 376.

Parol proof to show partnership dealing in mines must be clear and certain. *Mayhew* v. *Burke*, (Idaho) 29 Pac. 106.

Agreement to work together not necessarily a partnership. *Dunham* v. *Loverock*, 158 Pa. 197; 27 Atl. 990. Working together does not presume partnership. *Neill* v. *Shamburg*, 158 Pa. 263; 27 Atl. 992.

Special contracts between as to mode of working and compensation held not to destroy the partnership relation. *Ashenfelter* v. *Williams*, 7 Colo. App. 332; 43 Pac. 664.

An agreement by several to unite in attempted sale and divide commissions does not constitute partnership. *Mason* v. *Sieglitz*, 22 Colo. 320; 44 Pac. 588.

To constitute, there must be joint working as well as joint ownership. *Anaconda Co.* v. *Butte Co.* 17 Mont. 519; 43 Pac. 924.

An idle co-tenant is not a co-partner. *Bank* v. *G. V. B. M. Co.* 89 Fed. 449.

Contract to work, pay half the expense and receive half the product as compensation, does not make partnership under California code. *Stuart* v. *Adams*, 89 Cal. 367; 26 Pac. 970.

The Jim Crow mine, owned by a number of persons, was held by the plaintiff under what the complaint designates a lease, and was producing ore. While the lease was in force, the defendants purchased a half interest in the mine. The defendants were also the owners of a quartz mill. In October, 1893, while this state of facts existed, a contract or agreement was entered into by all the parties in interest, whereby the defendants were to haul the ore so produced to their mill and there reduce it to bullion, they to account for 85 per cent of the assay value of the ore. Of the proceeds the defendants were first to be allowed $25 per ton for hauling and working the ore, and then plaintiff was to be paid the expense of extracting it from the mine. There is no question upon either of these items. Fifty per cent of the balance was to be paid to the plaintiff, and the rest divided among the owners of the mine in proportion to their interests therein. Except as to the percentage to be accounted for, there seems to have been no serious controversy that these were the general terms of the agreement. The questions in the case are principally concerning matters incidental to the agreement. Several of the co-owners have assigned their claims under it to the plaintiff, and the action is brought to recover the 50 per cent due him, and the amount due those co-owners upon the reduction of the ore. Judgment was rendered in the plaintiff's favor for $25,266.08, and defendants appeal.

They first contend that the owners of the mine and the plaintiff were partners, and that consequently no action at law can be maintained by one against the others until there has been a settlement of partnership affairs, and a balance struck. This contention is based upon the allegations of the complaint; but, while that document is by no means a model, and is in some respects confused and self-contradictory we are unable to find that it states such a state of affairs as would constitute a partnership between the parties here.

Whatever may have been the terms of the original lease,

which are not stated, no question is made but that the rights of the parties are to be determined under the agreement of October, 1893. The owners of the mine were, as such, tenants in common, pure and simple. They were not engaged in working the property; so there was no mining partnership between them. The mere fact that they, either jointly or severally, made a lease of the mine, under which each was to receive his proportional share, had certainly no tendency to establish that relationship. Each seems to have acted for himself, and defendants were to account to each for his portion of the proceeds, individually. The plaintiff was in the first instance, to mine the ore at his own expense, and it does not appear that the owners were to have anything to do with that part of the business. While the plaintiff was to be repaid that expense out of the proceeds, this was simply one of the terms of the agreement under which the ore was being extracted. If no ore had been found, or it had paid nothing over milling expenses, the plaintiff must have sustained the entire loss. After the ore was mined, the plaintiff and several owners of the mine became the joint owners of it, in accordance with their several interests under the contract. It became personal property, in which they were tenants in common. (Freem. Coten. secs. 16, 100.) A mere joint ownership in personal property does not constitute the owners partners. (*Quackenbush* v. *Sawyer*, 54 Cal. 439). In *Hudpohl* v. *Water Co.* 80 Cal. 553, speaking of a similar contract, the court said: "As we construe the agreement, it was one for the working of the mine on shares and the parties became tenants in common of the products of the mine when taken out. Such a contract does not create the relation of landlord and tenant, but fixes a rule for compensation for services rendered. It is, in all its essential features, a contract for labor to be performed, and to be paid for by a share of the profits realized from such labor." See

also, *Stuart* v. *Adams,* 89 Cal. 367. Certainly no partnership existed so far.

Then as to the hauling and milling of the ore. That was done the same as defendants might have done similar work for any one else, and upon terms the same as those upon which the owners of the ore might have had it worked at any other mill. The mill men were paid a certain price therefor, and were to return a certain per cent of its assay value. Whatever profit they made upon the working was their own, and any loss must have been sustained by them. Of course, under the terms of the agreement, both the expense of milling and the expense of mining the ore would reduce the net proceeds which would in the end go to the several parties, but it was the proceeds of ore which they held as tenants in common, and not as partners. The question here is one of actual partnership between the parties, and not as to what might render them liable, as partners, to third persons. Actual partnership depends upon the intention of the parties. "The true test of partnership, then, is the intention of the parties. They have agreed together for a certain purpose. If the purpose was the formation of an associated body, different from the individual parties, for which they were thereafter to act, they have formed a partnership." (Pars. Partn., sec. 54.) There need not necessarily be a formal agreement of partnership, but it must appear that the parties intended to enter into that relation which the law denominates a partnership. Without trying to define what would constitute such a relation, it is sufficient to say that the elements of one do not exist here. There was no such association of the individuals, either intentional or unintentional, as would constitute a firm. In fact, there seems to have been no association of them, whatever. The only relation was the accidental one that they owned undivided portions of the same property. There was no agreement to do business jointly, and no com-

munity of interest. Each represented his own interest; and no one of them, nor even a majority, had any right to dispose of the property, nor even to make any contract concerning any portion but his own. In *Dwinel* v. *Stone,* 30 Me. 384, the court says: "One essential element of a partnership is a community of interest in the subject matter of it. *Tenet totum in communiet nihil separatim per se,* has been the keystone of the arch since the days of Bracton. From this arises the right of each partner to make contracts, to incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner, and with the same power, as all the partners could when acting together." No such power over the common property existed here, and there was no mutual agency between the parties. It follows that there was no partnership.

There is some conflict in the evidence as to whether defendants were to pay plaintiff 50 per cent of the net proceeds of the ore. The defendants deny that they so agreed; but, as they do not state what the agreement was, and it is beyond controversy, upon the showing made, that plaintiff had some interest in the ore, their testimony is not very satisfactory. However, the trial court having, upon conflicting evidence, found for the plaintiff, that finding becomes conclusive upon appeal. The same must be said concerning the percentage of the assay value for which the defendants were to account. The evidence was conflicting, and we are controlled by the finding that it was 85 per cent.

The defendants contend that, as it appeared that the agreement was in writing parol evidence of its contents, which is all that was offered, was incompetent, and should not now be considered. The ground, however, upon which parol evidence of the contents of a writing is rejected is that it is not the best evidence. If the instrument has been destroyed, or the party offering it, is under certain other circumstances,

unable to produce it, parol evidence of its terms may be the best and only evidence obtainable, and then it becomes strictly admissible. If the defendants were not satisfied with the parol proof, they should have objected, and had the writing produced or accounted for. Not having done so, they are concluded now from objecting that the evidence is incompetent to establish what the agreement was. "It is settled that if a party permits his adversary to prove his case by secondary evidence, he cannot afterward object that better evidence should have been produced. The secondary evidence is, under such circumstances, sufficient." (*Wright* v. *Roseberry,* 81 Cal. 87, 91). "If evidence secondary or hearsay in its character be admitted without objection, no advantage can be taken of that fact afterwards; and the jury may—indeed, should—accept it as if it were admissible under the strictest rules of evidence." (*Sherwood* v. *Sissa,* 5 Nev. 349, 355.)

One question in the case was the amount of moisture which should be deducted from the gross weight of the ore, the plaintiff admitting 3 per cent, and defendants contending for 8 per cent. The court allowed 5 per cent; and, again recalling the rule where the evidence is in conflict, we certainly cannot say that any error was committed. As one method of determining the amount of moisture, evidence was admitted, over defendants' objections, as to the amount contained in ore taken from the same ore body, and near where the ore in question came from, but in an adjoining mine, and shipped and worked under somewhat similar circumstances. We think this was some evidence upon the question in this case, and, consequently, that it was admissible. Defendant's criticisms upon it go more to its weight than to its relevancy. The same ruling applies also to the evidence concerning the assays of the battery samples taken by the plaintiff. His evidence tended to show that they had been carefully preserved, and had not been tampered with.

The fact that they were not assayed until some months after they were taken might reflect upon their reliability, but, certainly, under the proof, would not have justified their rejection.

Apparently as a part of the agreement, or at least, with the consent of all parties, the defendants had converted the bullion, which was gold, into money. They contend that the bullion, where produced, was of the value of only $19 per ounce, whereas judgment has been rendered against them upon a valuation of $20.6718 per ounce which we understand to be the standard assay value of gold. As defendants do not claim that they did not receive that amount for it, and as they were allowed the expense of marketing, no injustice seems to have been done, and the valuation appears to be strictly in accordance with the agreement. As the ore was gold ore, when the contract called for a certain per cent of assay value, some standard by which to estimate the value of the gold must have been understood, and this seems to be the only standard recognized anywhere. It was not shown that "assay value" is not the same in one place as in another. Or, if the term was intended to mean only the number of ounces of gold found in the rock, and the defendants saw fit to convert it into money instead of returning it in kind, in the absence of an agreement to the contrary no reason is suggested why they should not return to its owners the amount of money received by them, less the expense of the conversion.

Included in the judgment is a direction that the sum for which it is rendered shall draw interest from August 1, 1894, to the rendition of the judgment, on March 20, 1895. We are of the opinion that this item is erroneous. If interest was permissible at all, it should have been computed and included in the judgment when entered (*Bibend* v. *Insurance Co.*, 30 Cal. 79); but, without stopping to inquire whether, as this was not done, it ever became a part of the judgment,

and assuming that it did, we think no interest should have been allowed prior to the time judgment was rendered. At common law, no interest was allowed, and it is only permissible now when authorized by statute (11 Am. & Eng. Enc. Law, tit. "Interest," p. 379). Although interest is frequently allowed in actions involving torts to property, it is simply by way of damages, and in actions where the amount of damages is more or less in the discretion of the court or jury. In such cases, in the absence of special circumstances of fraud or oppression, the legal rate of interest from the time of the commission of the wrong is a safe and uniform measure of damages. *Glass Factory* v. *Reid,* 5 Cow. 587, 609. But this is not that kind of a case, and interest was not included as a part of the plaintiff's damages, but as an incident to the amount due him under the contract, and allowed as a matter of law. As such it does not come within the terms of our statute (Gen. Stats., sec 4903, as amended, Stats. 1887, p. 82), and consequently was improper. But, as this mistake would doubtless have been corrected, upon motion, in the court below, we do not think it should affect the question of costs upon this appeal.

Some other points are made by appellants' counsel; but what we have said above sufficiently indicates our views concerning them. No error appearing except that concerning interest, the judgment will be modified by striking that out; and, as thus modified, it will be affirmed, respondent to recover his costs of appeal.

It is so ordered.

S. C. MOORE v. A. HAMERSTAG.

(109 California 122; 41 Pac. 805. Supreme Court. September 12, 1895.)

[1]A mining claim is real estate and under the statute of frauds can be transferred only by operation of law or an instrument in writing.

Legislative grant. The exclusive right of possession conferred by the mining act of congress to the locator is in the nature of a legislative grant of an interest in land.

The location may be made in the name of another not the actual locator and such person becomes vested with the legal title to the claim.

Where there is no fiduciary relation and no previous contract a parol promise by the person whose name is used to convey to the actual locator is within the statute and non-enforceable.

Department 1. Appeal from Superior Court, Fresno county, S. A. Holmes, Judge.

[1]*Butte Co.* v. *Frank*, 25 Mont. 344; 65 Pac. 1. *Roseville Co.* v. *Iowa Gulch Co.* 16 M. R. 93. *Harris* v. *Equator Co.* 12 M. R. 178.

As to whether prospecting contracts are within the statute see note *ante* p. 244.

An agreement for a mining partnership is not within the statute. *Meagher* v. *Reed*, 14 Colo. 335; 24 Pac. 681.

An agreement for B to purchase a quarry with funds of A and thereafter to open and work the quarry together is not a contract for an interest in land within the statutes. *Treat* v. *Hiles*, 68 Wis. 344; 32 N. W. 517; 60 Am. Rep. 858.

Plaintiff agreed not to adverse if defendant would patent for joint account. *Held* within the statute. *Ducie* v. *Ford*, 138 U. S. 587.

Discoverer may transfer by parol his inchoate right to locate. *Doe* v. *Waterloo Co.* 70 Fed. 455; 18 M. R. 265.

The terms of an oral option being complied with, the case is not within the statute. *Walker* v. *Bamberger*, 17 Utah 239; 54 Pac. 108.

Mem. for sale of mine must be certain as to time of payment to take it out of the statute of frauds. *Snow* v. *Nelson*, 113 Fed. 353.

Where written terms are changed orally the whole becomes an oral contract. *Id.*

Action by S. C. Moore against A. Hamerstag for breach of contract to reconvey a mining claim alleged to have been located by agreement in his name. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

J. A. HANNAH, for appellant.

SAYLE & COLDWELL, for respondent.

HARRISON, J. The plaintiff located a mining claim under the laws of the United States, February 8, 1888, in the name of the defendant, signed the name of the defendant to the location, and posted and left the notice on the mine. In the following March he left a copy of the notice with the county recorder, to be recorded, unless he should otherwise instruct him within a few days, and paid the fee for recording, but never gave any further instructions to the recorder. Shortly after this, he saw the defendant, and informed him that he had posted notice on the claim in his name; and in his testimony says: "I told him that I had posted a notice on a claim in his name, and that before I had it recorded I came to see if it was satisfactory with him to have the mine stand in his name, and deed it back to me, as Mr. Stephens had formerly agreed to do; and he said it was agreeable." Soon after this interview with the defendant, the plaintiff conveyed an undivided half of the claim to one Broder, and he and Broder continued in possession of the mine, expending money in working it, taking to themselves all the proceeds. In December, 1890, the defendant, at the request of Broder, conveyed the mining claim to him. In February, 1891, the plaintiff demanded from the defendant a conveyance of the claim, and upon his refusal brought this action to recover damages for the breach of his agreement to make such con-

veyance. Judgment was rendered in his favor for $600. The defendant has appealed.

A mining claim is real estate (*Melton* v. *Lambard,* 51 Cal. 258), and under the provisions of the statute of frauds can be transferred only by operation of law, or an instrument in writing. The provision of section 2322 of the Revised Statutes of the United States conferring upon the locator of a mining claim "the exclusive right of possession and enjoyment" to the claim is in the nature of a legislative grant of an interest in the land; and the interest thus conveyed to the locator by the government cannot be transferred by parol, or otherwise than in accordance with the statute of frauds. *Goller* v. *Fett,* 30 Cal. 481; *Garthe* v. *Hart,* 72 Cal. 541, 15 Pac. 93. The location may be made in the name of another than the actual locator (*Morton* v. *Mining Co.,* 26 Cal. 527; *Rush* v. *French,* 1 Ariz. 105, 25 Pac. 816); and when so made the person in whose name it is made becomes vested with the legal title to the claim (*Van Valkenburg* v. *Huff,* 1 Nev. 142) and it is not necessary for its validity that it should be recorded (*Thompson* v. *Spray,* 72 Cal. 533, 14 Pac. 182).

By virtue of the acts done by the plaintiff in reference to the mining claim in question, the defendant became vested with the legal title thereto as fully as if the plaintiff had located the claim in his own name, and afterwards, by a conveyance absolute in form, and without any consideration, transferred it to the defendant. The defendant could not by any oral declarations subsequent to such conveyance, render himself a trustee for the plaintiff, or bind himself to transfer the claim to him. An absolute conveyance of lands cannot, after its execution, be turned into a trust by any oral declarations of the parties thereto. *Feeney* v. *Howard,* 79 Cal. 525, 21 Pac. 984; *Hasshagen* v. *Hasshagen,* 80 Cal. 514, 22 Pac. 294; *Sherman* v. *Sandell,* 106 Cal. 373, 39 Pac. 797. The plaintiff did not locate the claim in the

name of the defendant by reason of any fiduciary relations between them (see *Feeney* v. *Howard, supra*), nor was it made under any prior agreement on the part of the defendant to hold the same in trust for him. The cases of *Gore* v. *McBrayer,* 18 Cal. 583, and *Moritz* v. *Lavelle,* 77 Cal. 10, 18 Pac. 803, do not aid the plaintiff, and are not in contravention of this rule. In both these cases the location was made under a prior agreement between the parties that it should be for the joint interest of both. At the time of the transaction involved in *Gore* v. *McBrayer* a mining claim could be transferred by parol, the statute requiring it to be in writing having been passed in 1860; and in *Moritz* v. *Lavelle* the location was made by both parties in the name of the defendant, upon the express agreement between them at the time of the location that, in consideration of the prior agreement of the plaintiff to furnish the means for its location and working, the defendant would transfer an interest therein. In *Gore* v. *McBrayer* the location was originally made in the name of both parties, and it was held that the interest thereby vested in the plaintiff could not be defeated by tearing down the notice and making a new location, in which the plaintiff's name was omitted.

The court should have excluded the oral evidence of the agreement by the defendant to reconvey the mining claim to the plaintiff, and should have granted the nonsuit asked by the defendant.

The judgment and order are reversed.

VAN FLEET, J., and GAROUTTE, J., concurred.

JENNIE D. SHELLAR ET AL. v. JAMES S. SHIVERS ET AL.

(171 Pennsylvania 569; 33 Atl. 95. Supreme Court. October 22, 1895.)

[1]**Construction as to length of term.** An oil lease, the term of which is for "three years, or as much longer thereafter as oil or gas might be found in paying quantities," extends only for three years, unless gas or oil is found in paying quantities before their expiration.

Casings in an oil or gas well are trade fixtures, and become the property of the landowner, if not removed by the lessee during, or within a reasonable time after the expiration of, his lease.

"At any time." Where an oil lease provides that it is to continue for a term of three years, unless oil or gas is found in paying quantities before their expiration, and in that event as long as the productiveness of the well lasts, the words "at any time" in one of its clauses, giving the lessee "the right * * * to remove any or all machinery," refer to that part of the terms which is dependent upon oil or gas being found in paying quantities.

Appeal from Court of Common Pleas, Washington county.

Trespass by Samuel M. Shellar against James S. Shivers, Insell Brenell, and others, to recover for the removal of certain casings from an oil well on property belonging to plaintiff. Plaintiff died pending the action, and his widow and heirs were made parties plaintiff. There was judgment in their favor, from which defendants Shivers and Brenell appeal. Affirmed.

[1]*Double* v. *Union Co.* 172 Pa. 388; 18 M. R. 327.
Balfour v. *Russell*, 167 Pa. 287; 18 M. R. 202.
Eaton v. *Allegany Co.* 122 N. Y. 416; 25 N. E. 981.

Where the lease provides for landlord to take the fixtures at a valuation, no tender by the lessee is necessary. *White Stone Co.* v. *Belknap Co.* 13 Ky. L. R. 244; 16 S. W. 354; 17 S. W. 162.

Fixtures may be removed notwithstanding forfeiture of the lease. *Mickle* v. *Douglas*, 17 M. R. 137.

The following opinion was rendered by McIlvaine, P. J., in the court below:

"On the 27th day of October, 1892, Samuel M. Shellar was the owner in fee and was in possession of a tract of land, situated in Buffalo township, containing 255 acres, more or less. On that day the defendants entered upon said tract of land, against the will and without the consent of the owner, Samuel M. Shellar, for the purpose of taking casing out of a hole that had been drilled for oil and gas in the spring of 1887, and of removing other fixtures which had been used in drilling this well, which produced neither oil nor gas in paying quantities. The casing and fixtures, at the time the well was drilled, belonged to the defendants. Samuel M. Shellar, claiming that this entry upon his land for the purpose indicated was unlawful, brought an action of trespass against the defendant. He having died before that action was tried, his heirs and the defendants have agreed upon the facts, and have submitted them, in the nature of a special verdict, for the opinion of the court. On November 11, 1885, Samuel M. Shellar executed and delivered to J. B. Akin a lease of this 255 acres, for oil and gas purposes. The term was for 'three years, or as much longer thereafter as oil or gas might be found in paying quantities, with the right in the said lessee to enter upon said premises, at any time, for the purpose of mining,' etc. The lease also provided that the lessee had 'the right to remove at any time any and all machinery, oil-well supplies, or appurtenances, of any kind, belonging to the said lessee.' The lessee and those who claimed under him entered under said lease upon this tract of land, and drilled a well, completing it in April, 1887. The well produced neither oil nor gas in paying quantities, and the lessee and his assigns ceased operations on the premises. The engine and boiler used in drilling the well were taken away, but the casing in the well and other fixtures, were left and remained on the premises, and were there on the said 27th dav of

October, 1892, when the defendants entered to remove them. The question for determination is, were the defendants trespassers? Had they a right to remove the fixtures connected with and used in drilling this well, which was completed and abandoned as worthless in April, 1887?

"The term was for three years from November, 1885, or as much longer as gas or oil is found in paying quantities; that is, as much longer as gas or oil is found in paying quantities, if found before the expiration of the three years. *Gas Co.* v. *George*, 161 Pa. St. 47, 28 Atl. 1004. There was no oil or gas found in paying quantities. Therefore this lease expired on the 11th day of November, 1888, nearly four years before the defendants undertook to remove the fixtures which they left behind when they ceased operations; and from the time they ceased operations at this well until the expiration of the lease, over eighteen months' interval. I do not think that there can be any doubt that the casing in an oil or gas well, the derrick, and other appliances used in drilling and operating it, are trade fixtures, and can be removed by the owner or lessee during the term of the lease. On the other hand, I think there can be no doubt that they are such fixtures that they become the property of the landowner, if not removed by the lessee during the term, or at least within a reasonable time after its expiration. These two propositions are both, of course, subject to modification by the agreement of the parties. Are they modified in this case? Because, if they are not, then the defendants had no right to enter upon the plaintiff's land for the purpose of removing the fixtures in question. The lease provides that the lessee shall have 'the right to remove, at any time, any or all machinery,' etc. It is claimed that the words at 'any time' must be given their fullest meaning, and that the defendants' right to remove fixtures, by agreement of the lessor, was unlimited as to time, and that although their entry to remove the casing was made four years after the

lease expired, and five years and six months after the well was completed, and found to be of no use as an oil or gas well, yet their entry and purpose were lawful as they had the right to remove any or all fixtures at any time. We think that this was not the intention of the parties, as gathered from the language of the lease. The lease was for a fixed period, to be extended to an indefinite period, and the extension to depend upon what the future might develop. The right to enter at any time, and the right to remove machinery at any time, was predicated of that part of the term that was uncertain; that is, after three years the lessee had the right, at any time, to enter and drill additional wells, if oil or gas was being produced in paying quantities; and had the right, although the three years had passed, to remove the machinery and fixtures after or when the well would cease to produce oil or gas in paying quantities. If this construction is correct then the rule of law as to removal of fixtures would be as in cases where the tenancy is uncertain in duration, as when it depends upon a contingency, and that is that the removal must be made within a reasonable time; or, in other words, the law, in such cases, allows the tenant a reasonable time for the removal of fixtures. Here the lessees, if oil or gas had been found in paying quantities, would have had a reasonable time within which to draw their casing and remove their derricks after it had become apparent that the operation of the wells was no longer profitable, let this be soon or long after the expiration of the three years; at any time when they thought it would no longer pay to operate their wells which had been producing oil or gas in paying quantities, they had a right to remove the fixtures connected with such wells. Under the facts as we have them in this case, however, operations ceased on this lease in April, 1887. A dry hole was found. Nothing was done between the completion of this well and the time when the lease expired in November, 1888; and after that four years are allowed to ex-

pire, before an attempt to remove these fixtures was made. In our opinion, this was too late. If, under the words 'at any time,' the lessee could take four years after the expiration of the lease to remove his fixtures, he could as well take twenty years. To say that the lessor could prevent this by giving notice that the fixtures must be removed within a certain time is to read something into the contract that is not there."

JOHN W. DONNAN and R. B. STONE, for appellants.

T. F. BIRCH, for appellees.

PER CURIAM. This judgment was entered on the case stated, for the opinion of the court, in the nature of a special verdict. The question involved was whether, under the terms of the lease, the lessees had the right to remove the material, machinery, and fixtures placed by them upon the property for the purpose of drilling the oil well, and remaining there after the expiration of the lease. In a clear, concise, and satisfactory opinion, the learned judge rightly held that they had not; and he accordingly entered judgment in favor of the plaintiffs, as provided for in the case stated. The correctness of this conclusion is so fully vindicated in the opinion that, without further discussion of the subject, we affirm the judgment on said opinion.

Judgment affirmed.

JOHN S. DOE V. WATERLOO MINING CO.

(70 Federal 455. Circuit Court of Appeals, Ninth Circuit. November 8, 1895.)

[1]**Location completed by new associates with change of name.** One N. discovered a mineral bearing lode, and posted on the spot a notice claiming the right to locate 1,500 feet on the lode and 300 feet on each side thereof, naming it the "R. J. Lode," and also claiming the right to have 20 days in which to complete his boundary monuments. He afterwards went to the premises to mark the boundaries, but was prevented by sickness, but within 20 days he agreed with three other persons to give them half the claim if they would complete the location, which they did by setting up the monuments and posting a location notice, describing the same, in which the claim was called the "R. J. Gold, Silver, and Nickel Quartz Mining Claim." *Held*, that the location made by N's associates was a completion of the claim made by N., notwithstanding the addition of descriptive terms to the name of the claim in the notice posted by them. *Newbill* v. *Thurston*, 65 Cal. 419; 4 Pac. 409; disapproved.

The posting of the notice upon a single stake on the claim by the original discoverer amounted only to notice of discovery and was not in itself a complete location.

[2]**Discoverer taking in associates before location.** The original discoverer had a right to transfer by parol an interest in his right to locate his claim to his associates, and his doing so and permitting them to complete the location was not an abandonment of such right.

[3]**Reasonable time to perfect location.** The discoverer of a mineral vein should have a reasonable time after his discovery to complete his location, the length of time depending on the character of the ground, the means of marking it, and the ability to ascertain the course or strike of the vein. In this case 20 days

---

[1]*Raymond* v. *Johnson*, 17 Wash. 232; 19 M. R.—.

Lockhart v. *Leeds*, 10 N. Mex. 568; 63 Pac. 48.

An agent cannot relocate over his principal's claim. *Fisher* v. *Seymour*, 23 Colo. 542; 49 Pac. 30.

[2]*Omar* v. *Soper*, 15 M. R. 497. *Thompson* v. *Spray*, 72 Cal. 528; 14 Pac. 182.

[3]*Bramlett* v. *Flick*, 23 Mont. 95; 20 M. R.—.

Delay of three months after discovery to complete location, is fatal as against an intervening location. *Patterson* v. *Tarbell*, 26 Oreg. 29; 37 Pac. 76.

was not an unreasonable time, the vein being situated on a rough mountain side, the dip not exposed, and 1,000 feet of the vein covered by slide.

Place of posting. It is not essential that the notice be posted on the actual outcrop of the vein.

Parties not required to show right to patent. The congressional act requiring that in an adverse claim suit, if neither party proves title, the jury shall so find, etc., cannot be construed to require the court in adverse cases to compel either party to show his right to obtain a patent for the ground. The court tries only the right to possession, decides this issue, and the application is then turned back to the land office.

The citizenship of the stockholders of a corporation need not be proved for the purpose of establishing its right to patent a mining claim, otherwise than by showing it to be organized under the laws of a state of which its stockholders are conclusively presumed to be citizens.

Assignment of error too general. An assignment of error stating that "there is error in said decree in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant," is too general, and cannot be aided by an attempt to make the same more particular in the brief.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a suit commenced by John S. Doe against the Waterloo Mining Company, pursuant to Rev. St. §§ 2325, 2326, to determine the right of possession of mining lands for which conflicting applications for patents had been filed. A demurrer to the complaint was overruled (43 Fed. 219), and a decree was rendered for the defendant (55 Fed. 11). Complainant appeals. Affirmed.

P. REDDY, J. C. CAMPBELL and W. H. METSON, for appellant.

A. H. RICKETTS, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

KNOWLES, District Judge. The Waterloo Mining Company, on the 12th day of September, 1889, made an application at the United States land office at Los Angeles, Cal., for a patent for the Red Jacket quartz lode mining claim. John S. Doe, the appellant in this case, within 60 days thereafter, —the time allowed by law,—filed in said land office his adverse claim to the claim made in the application of said company, in which he, the said Doe, claimed to be the owner of a portion of the premises described in said application as the "Red Jacket Lode Claim," and which portion he claimed to be the Mammoth lode claim. Within 30 days after filing his adverse claim said Doe commenced this action against said company in order to determine the right to the possession of that portion of the Red Jacket claim, which is described as the "Mammoth Claim." The cause was commenced in the superior court of San Bernardino county, Cal., and on petition was removed from the same to the United States circuit court for the Southern district of California. The cause was tried in the last-named court, and judgment rendered for the said company. The plaintiff then appealed the cause to this court.

From the evidence it appears that on the 26th day of March, 1881, one P. H. Newbill made the discovery of a mineral-bearing vein or lode in what was called "Grapevine Mining District," San Bernardino county, Cal. On that day he posted a notice upon said premises known as the "Red Jacket" lode or claim, claiming the right to locate 1,500 feet on said lead and 300 feet on each side of the same, and also claiming the right to have 20 days from said date in which to complete his boundary monuments. Subsequent to the said 26th day of March he went to the said premises with the view of marking the boundaries of his claim, but owing to sickness was prevented from so doing. It also appears he had some doubts as to how he should locate his claim. On the 11th or 12th of April, following, he made an agreement

with G. B. Wallace, H. C. Parks, and J. B. Farrell to the effect that if they would complete his location on said ground he would give them one-half of said claim. In accordance with said agreement, on one of said dates these parties did mark the boundaries of said Red Jacket claim by placing along the same, at the sides and ends thereof, some seven monuments of stone, about 2½ feet high. They posted a notice on the center monument on the east end line, describing the same, and which was a location notice. On some of the other monuments notices were placed indicating the corners of the location. The said location notice names the claim as the "Red Jacket Gold, Silver, and Nickel Quartz Mining Claim." The name in the Newbill notice was the "Red Jacket Claim." On the 6th day of April, 1881, 6 days before Parks, Wallace and Farrell marked the boundaries of their location, and some 11 or 12 days after Newbill had posted his notice on the same, T. C. Warden and Dr. G. W. Yager located what they called the "Mammoth Lode." This included a part of the Red Jacket lode claim. There is no contention but that the boundaries of both claims were properly marked.

The first contention is that the location of the Red Jacket gold, silver, and nickel mining claim is not a completion of the claim made by Newbill. The supreme court of California, upon the same evidence, in the case of *Newbill* v. *Thurston,* 65 Cal. 419, 4 Pac. 409, held that it was not. With the highest respect for that distinguished court, I cannot come to the same conclusion. Newbill undoubtedly made some kind of a mineral discovery on the ground located. He posted a notice on this ground claiming the right to locate some 1,500 feet on the same,—500 feet in one direction and 1,000 feet in another from the point where he posted his notice. He went upon the ground after this with the view of marking the boundaries of his location, and was prevented by sickness. He made an agreement, for a valuable

consideration, with Parks, Wallace, and Farrell, by which they were to complete his location. In pursuance of that agreement they did complete it. That was the contract and intention of all parties. The fact that a new location notice was posted by them on the ground, in which an addition of some descriptive terms was applied to the name given in the location notice of Newbill, cannot make it a new location. The ground was what was sought, not a name. There is no objection to changing the name of a location until after a record is made of the same. There can be no objection to changing the description in a location notice, so other ground is not embraced, up to the date the location notice becomes a record. From necessity such a fact would often occur in the location of mining ground. A location notice generally does describe the ground located, and not what it is proposed to locate. The notice of Newbill should have no other force than a notice of discovery. As a notice of discovery and intention to claim and locate the ground described therein, it was certainly sufficient. *Erhardt* v. *Boaro*, 113 U. S. 527, 5 Sup. Ct. 560; *Marshall* v. *Manufacturing Co.*, (S. D.) 47 N. W. 293.

There is a considerable space in the brief of appellee devoted to maintaining that the notice and acts of Newbill were a sufficient location of the Red Jacket claim; that the one stake he placed upon the ground, claiming 500 feet one way and 1,000 feet in another way on the vein discovered, with 300 feet on each side of the same, was a sufficient marking of the boundaries thereof. In the location of quartz lodes, before the mineral act of 1872, such a mode of location was common. Since that date, I know of no instance in which such a location has been sustained. Since that date, it has generally been held that in some way the location should be made in the form of a parallelogram, and the location so marked that its boundaries can be readily traced. The cases of *Golden Fleece Co.* v. *Cable Cons. Co.*, 12 Nev.

312-330; *Book* v. *Mining Co.*, 58 Fed. 106; *Gleeson* v. *Mining Co.*, 13 Nev. 442-558; *Holland* v. *Mining Co.*, 53 Cal. 149; *Gelcich* v. *Moriarty*, Id. 217,—maintain fully that such a location as is claimed for Newbill is insufficient. It is also claimed that the above-named cases decided by the supreme court of California were overruled by the same court in the case of *Carter* v. *Bacigalupi*, 83 Cal. 187, 23 Pac. 361. I do not think this should be asserted. The question presented in the last case was the sufficiency of a location notice under the local rules of the district, and not as to the marking of the boundaries of a claim. Certainly it does not purport to overrule the former cases. Many cases might be cited from other states and territories showing that such a location is invalid.

. Appellant claims that the Newbill right was abandoned because he allowed Parks, Wallace, and Farrell to become joint locators with him. There was no intention on his part to abandon his rights. Certainly the contrary appears in his contract with these parties. Abandonment rests, as a rule, in intention. Newbill, at the time he made his contract with Parks, Wallace, and Farrell, had only the right to make a location of a claim on account of his discovery of a mineral-bearing vein containing gold. There was no rule of law that prevented his making a verbal transfer of this right. Until the statute of California provided otherwise, a mining claim could be transferred by parol or verbal conveyance accompanied by a change of possession of the premises. *Tunnel Co.* v. *Stranahan*, 20 Cal. 199; *Mining Co.* v. *Taylor*, 100 U. S. 37. The mere right, then, to locate a mining claim, could certainly be so conveyed in the absence of any statutory law. When such a transfer was made there was no objection to the parties making the purchase joining in the location.

The next point presented is, were the boundaries of the claim marked and the location completed within a reasonable

time after the discovery by Newbill? In his testimony explaining the claim he made in his notice, of 20 days in which to complete his location, Newbill said:

"The reason was that I understood that it was a general understanding that we were allowed twenty days to complete our location. I was aiming to comply with the custom and law, and I thought having that twenty days was according to the custom and law. I was of the opinion that it was in the law, but as I saw in the—(Interrupting): Just give your reasons. A. My reason at that time was I thought it was embraced in the law. I knew it to be a custom—law and custom together,—and would try to comply with them. The Court: Q. That is, you thought there was a law and custom allowing twenty days? A. Yes sir. Q. Was that the custom in that section of the country?"

This, for some reason that does not fully appear, was never answered.

There was no objection to proving that there was a custom in the Grapevine mining district allowing a discoverer of a mineral-bearing vein 20 days after his discovery in which to fully complete his location of his claim. Section 2324, Rev. St., gives "the miners of each mining district" the right "to make regulations not in conflict with the laws of the United States or with the laws of the state or territory in which the district is situate governing the location of mining claims." Such a regulation may be evidenced by a written rule, or by an observed custom in the district, not in writing. *Flaherty* v. *Gwinn,* 12 Morr. Min. R. 605; *Harvey* v. *Ryan,* 4 Morr. Min. R. 490. Whether this evidence would warrant a court in finding that there was any custom in Grapevine mining district giving any time for the completion of the location of a mining claim after the discovery of a vein is doubtful. There is nothing in the evidence which confines the custom to that district, although given in connection with making a location in that district. The question which, if answered, would have made this point clear, for some reason, was not answered. The court

found there was no such rule or custom. Under the evidence this court would not be warranted in reversing that finding. There is no doubt but the discoverer of a mineral vein should have a reasonable time after the discovery of his vein in which to complete his location embracing the same.

Upon the question of the reasonable size of a mining claim a general custom may be shown, where there is no local rule defining the same. *Tunnel Co.* v. *Stranahan,* 9 Morr. Min. R. 457. Upon the same reasoning a court might consider a general custom as to the time given a miner after his discovery in which to make his location complete. Upon the reasonableness of the time claimed such evidence as recited above might be considered. Wherever there has been any legislation upon the subject the time given after the date of discovery in which to complete a mining location has exceeded 20 days. The statute in Colorado is 60 days, and the record thereof must be made within 30 days thereafter. Without consulting what has been considered by rules and regulations or statute law upon the subject as to the time within which after discovery the location of a mining claim should be completed, we would say that what would be a reasonable time for such completion would depend upon the circumstances affecting the ability of the locator to properly define his claim. The sickness of the locator which would prevent his performing the necessary work to accomplish this cannot be classed as such a circumstance. *Jones* v. *Anderson,* 82 Ala. 302, 2 So. 911; 19 Am. & Eng. Enc. Law, p. 1090. If sickness would excuse the performance of the necessary work in completing a location, for how long a time would it act as an excuse? If for any time, why not for a very long and indefinite time? I think the circumstances should be such as pertained to the ground to be located, its character, the means of properly marking the ground sought to be located, and the ability to properly ascertain the dimensions and course or strike of the vein on ac-

count of which the location is made. Courts that have been called upon to try mining cases have observed the haste with which such locations are made, and the want of the requisite care in so marking the boundaries of the locations concerning which disputes arise as to properly embrace the apex of the vein which is sought to be appropriated. Recurring to the evidence as to the character of the ground where this location was made, and as to the vein on account of which the location was made, and we find that the ground was upon a rough mountain side; that the vein was exposed about 400 feet in one place and about 40 in another. It does not appear that the dip of the vein was exposed at any point. There was a large amount of quartz upon the side of the mountain. One thousand feet of the vein was covered. Under these circumstances I think 20 days was a reasonable time to allow for the completion of the Newbill location. The fact that neither he nor his associates made any extended researches on the ground in order to fully show the course of the vein makes no difference. They may have been fortunate in marking their boundaries. In affording a reasonable time in which to complete a location, the object is to eliminate, as far as circumstances will permit, guesswork in the location of quartz lodes. The question is, what would be a reasonable time for a competent locator to have, under all the circumstances, in which to complete his location? And, as I have said, I think 20 days would not be unreasonable. When the Red Jacket claim was properly located, on the 12th of April, 1881, this location related back to the date of the discovery by Newbill, on the 26th of March preceding. *Gregory* v. *Pershbaker*, 73 Cal. 120, 14 Pac. 401. The location of the Red Jacket must be held, then, to be prior to that of the Mammoth.

It is urged that the notice posted by Newbill was not placed upon the vein located. The evidence is that it was placed upon a part of the said vein,—a spur thereof. It was

not necessary that the notice should be placed upon the croppings of the vein. If near by the same, it would be sufficient if it indicated the vein sought to be located. *Phillpotts* v. *Blasdel,* 4 Morr. Min. R. 341. Parks and his associates had no trouble in determining what was the vein Newbill sought to locate.

There are some nine assignments of error in the transcript. In the brief seven additional assignments of error are made. Appellee maintains that the court should not consider these additional assignment; that rule 11 of this court (47 Fed. vi.)[1] precludes the court from considering them, except on its own motion. The contention of appellant is that these additional assignments are only specifications under the first assignment of error. Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court. The assignment of error in question reads as follows: "There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant." This is too general. There is no specification showing wherein the decree is not supported by the evidence. It is not correct that the seven additional assignments of error are specifications under this assignment. The tenth assignment of error —one of the additional seven—is, "There is error in the decree, in that the question whether or not the defendant was entitled to the right of possession as against the United States of America was not decided or determined thereby."

The thirteenth assignment of error is that the decree was

[1] 11 C. C. A. cli.

erroneous because it does not appear in the pleadings, anywhere, that the stockholders of the Waterloo Mining Company, the defendant, were citizens of the United States. The other additional assignments of error come under heads that have already been considered. There is no doubt that the court may consider the question of jurisdiction, although not made the subject of an assignment of error. It seems to be contended that it was necessary for the court to determine whether or not the appellee was entitled to a patent from the United States; that without such determination the object sought by the suit has not been obtained, and the land department properly instructed as to the rights of an applicant for a patent. If this is a correct view of the law, this point should be considered. The statute which it is claimed requires of the court such a decree or judgment, reads as follows:

"That if in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes title to the ground in controversy shall not be established by either party the jury shall so find and judgment shall be entered accordingly."

When a cause is tried by a court without a jury, undoubtedly the same duty falls upon it as upon a jury, under said statute. It will be seen that it is only when title to the ground shall not be established by either party that the verdict shall be against both. If one of the contending parties should establish title,—that is, the right to possession of the premises in dispute on account of a compliance with the mining laws of the United States and the laws of the state and the rules and customs of miners,—then there is no authority in the statute to find against the United States, and that the party so establishing title is entitled to a patent from the United States. The suit does not purport to be one against the United States. The United States is not named as a party. No authority is given by the statute to sue the

United States in such a matter. The application for a patent for mineral land is made to the land department of the United States. Ultimately that department must determine the right to the patent. The trial of the right to possession of a given tract of mineral land is a proceeding in aid of that department. It was not intended that when this issue was presented to a court it should operate as a transfer of the whole case made by the application, and that thereafter the land department would have nothing to do but to carry into effect the judgment of the court. A state court of general jurisdiction has the power to determine this issue, and such courts are often called upon to try causes arising under the said section 2326. Can it be supposed that it was intended that under the said statute such a court would have the power to determine whether or not the United States should issue a patent to any applicants? The power to sue the United States in a state court should rest upon some positive statute. It cannot be inferred from such a statute as the one in question. For these reasons I do not think this assignment of error can be sustained.

The question presented in the thirteenth assignment of error affects the jurisdiction of the lower court and of this court. It does not appear in any of the pleadings or in the evidence that the stockholders of the Waterloo Mining Company were, all or any of them, citizens of the United States. The plaintiff would not be benefited by this omission if it were true that none of said stockholders were citizens. It is alleged in the answer that Newbill and his colocators were all citizens of the United States. This fact is stated in their location notice, and that is in evidence in this case. Newbill and Parks both testify to their citizenship. An affidavit of one Emil A. Sanger, in evidence, states that all of said locators were citizens of the United States. The grantees of these locators would be entitled to the possession of the premises located, as against plaintiff. *Manuel* v.

Wulff, 152 U. S. 505, 14 Sup. Ct. 651. The question might be considered as affecting the duty of the court to find against the defendant. In the case of *McKinley* v. *Wheeler*, 130 U. S. 630, 9 Sup. Ct. 638, the supreme court holds that a corporation all of whose stockholders are citizens of the United States had the power to locate a mining claim. The inference is, although not stated, that only corporations whose stockholders are citizens of the United States can locate such claims. Section 2325 of the Revised Statutes provides that persons who can locate mining claims may make an application to patent the same. The question would arise, how is this citizenship of stockholders to be established? It is alleged in the bill, and expressly admitted in the answer, that the appellee is a corporation organized and existing under the laws of Wisconsin. A certified copy of its articles of incorporation were introduced in evidence. Section 2321, Rev. St., provides:

"Proof of citizenship under this chapter may consist in the case of an individual of his own affidavit thereof, in the case of an association of persons unincorporated, of the affidavit of their authorized agent made of his own knowledge or upon information and belief, and in the case of a corporation organized under the laws of the United States or of any State or Territory thereof by the filing of a certificate of incorporation."

The question might arise, why would the certificate of incorporation establish the citizenship of the stockholders? In considering the question of jurisdiction in the federal courts, it is an established rule that, when a corporation organized under state laws is a party, it is conclusively presumed that the stockholders thereof are all citizens of that state. *Muller* v. *Dows*, 94 U. S. 445. Congress was familiar with this rule, and it seems probable intended to establish a similar rule under the mineral land act of 1872. The practice in the United States land office has been, I think, universal, not to require of a corporation seeking to patent mining ground

proof of the citizenship of its stockholders, other than by the production of a certified copy of articles of incorporation. After the passage of the act of March 3, 1887 (24 Stat. 477), which provided that no corporation, more than 20 per cent. of the stock of which was owned by persons not citizens of the United States, should acquire real estate in the Territories of the United States or the District of Columbia, corporations making application to patent mining claims in a territory were required to show that 80 per cent. of their stockholders were citizens of the United States. But this rule never prevailed under the mineral act of 1872 anywhere. It would have been a great hardship on a corporation to have had to prove that all of its stockholders were citizens of the United States. The practice in the land department of the United States under this statute should have great weight in construing it. *Hahn* v. *U. S.*, 107 U. S. 402, 2 Sup. Ct. 494; *U. S.* v. *Moore*, 95 U. S. 760; *Brown* v. *U. S.*, 113 U. S. 568, 5 Sup. Ct. 648. Considering the statute and the practice thereunder, I think the citizenship of the stockholders of the Waterloo Mining Company was sufficiently established. It was not necessary to allege in the answer what was conclusively presumed from the facts alleged. Hence it was not necessary to have alleged in the answer that the stockholders of appellee were citizens of the United States.

With these views of the law in this case, I think the decree in this case should be affirmed, and it is so ordered.

The decree is affirmed, with costs of appellee.

WILLIAM H. ARMSTRONG v. LAKE CHAMPLAIN GRANITE CO.

(147 New York 495; 42 N. E. 186. Court of Appeals. Nov. 26, 1895.)

[1]Granite is not a mineral ore in either the popular or the scientific sense.

Ore means a compound of a metal and some other substance.

Local meaning of the word "minerals." That certain persons understood that the word did not include granite, but only ores containing metals, with no evidence of transactions based on such meaning, is no proof of a local usage, if indeed such usage, if proved, would control the interpretation.

Construed with context. Though the words "minerals and ores" in a deed, standing alone, would include granite, where the surface rights granted are only "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores," they will be *held* to include only minerals obtained by underground working.

Appeal from Supreme Court, general term. Third department.

Action by William H. Armstrong against the Lake Champlain Granite Company. From a judgment of the general term (24 N. Y. Supp. 1144, mem.) affirming a judgment for defendant, plaintiff appeals. Affirmed.

RICHARD L. HAND, for appellant.

CHESTER B. MCLAUGHLIN, for respondent.

[1]*Hext* v. *Gill*, 17 M. R. 1.

Minerals in place are realty; when severed they become personalty. *Williams* v. *Gibson*, 16 M. R. 243.

Oil and gas not covered by deed of coal, iron, clay and other valuable minerals. *Detlor* v. *Holland*, 57 Oh. St. 492; 49 N. E. 690

Mexican onyx is "marble" under the Revenue Acts. *Batterson* v. *Magone*, 48 Fed. 289.

Mineral water—construed to be a mineral in a lease. *Geneva Co.* v. *Coursey*, 61 N. Y. Sup. 105.

ANDREWS, C. J. This action was brought to restrain the defendant from quarrying granite upon lot 27, Split Rock tract, in Essex county. Both parties claim title to the granite.

The plaintiff claims under two deeds from Philip S. Baldwin, the common source of title, to John Bridgford and others, one dated March 30, 1871, and the other May 18, 1871. By the first deed, which recites a consideration of $800, Baldwin conveyed to the grantees "all the mineral ores" on the tract "together with all needed ways and privileges for mining and raising and removing said mineral ores, excepting and reserving such mineral ores as were originally reserved by the state of New York, and reserving all other rights and interests in said lands save said mineral ores and the right to raise and remove the same."

By the second deed, which makes no reference to the first deed, but which recites the same money consideration, the grantor conveyed "all the mineral and ores [on the same premises], with the right to mine and remove the same; also, the right to sink shafts, and sufficient surface to erect suitable buildings for machinery, and other buildings necessary and usual in mining and raising ores; also, the right of ingress and egress for mining purposes, and to make explorations for minerals and ores, saving reservations to the state of New York."

In June, 1890, the plaintiff, by conveyance to him, acquired the right vested in the original grantees of Baldwin under the deeds mentioned. In March, 1889, the defendant, as grantee of a prior corporation in which, through mesne conveyances, the title to the lands remaining in Baldwin after the conveyance to Bridgford and others in 1871 was vested, acquired such title. Before the conveyance to the defendant, and about the year 1880, a vein of granite 300 to 400 feet in width had been discovered on the premises. The land was thickly wooded, and the granite discovered was

overlaid by soil from 4 to 6 feet deep. Prior to the defendant's purchase the vein had been uncovered to some extent, and some work had been done by the defendant's grantors in getting out granite for market. The defendant took immediate possession of the premises under its deed, and commenced active operations in developing the granite, and up to June, 1890, when the plaintiff acquired his alleged title, the defendant had expended, in opening the quarry, erecting buildings and machinery, and in necessary work for conducting the business, the sum of about $35,000.

The determination of the controversy in this case depends upon the interpretation of the second deed from Baldwin to Bridgford and others of May 18, 1871. Under the deed of March 30, 1871, which conveyed only the "mineral ores" on the lot, it is plain that the granite did not pass. The word "ore" has a definite signification, and designates a compound of metal and other substance. Granite neither in a popular nor scientific sense is a mineral ore. The second deed conveys the "minerals and ores," and also amplifies by words, if not in law, the mining privileges and the right to use the surface given by the first deed. There is no explanation of the circumstances which led to the giving of the second deed. There is nothing to show that it did not express the real intention of the parties.

We think the necessary inference from the comparison of the two deeds is that the second was intended to convey rights not included in the prior grant, and that the words "minerals and ores" cannot be cut down to the same meaning as "mineral ores" in the first deed, upon any theory that no new consideration was given for the second deed, or that the whole purpose of the second deed was to define more clearly than was done by the first deed the incidental mining privileges intended to be granted, and not to enlarge the grant as to the kind of minerals granted.

If the first deed has any importance in the case, it

strengthens rather than weakens the position of the plaintiff. The whole question, as above intimated, turns on the interpretation of the words "minerals and ores" in the second deed. In view of the conclusion we have reached and to avoid possible misconceptions in the future, it is proper to state that, in our opinion, the evidence given and admitted on behalf of the defendant, under objection by the plaintiff, that the purpose of Bridgford and his cograntees in securing the deeds of 1871 was to acquire the iron ore then supposed to exist on the premises, and of their statements, contemporaneously with the purchase, that they had purchased the iron ore on the lot, was incompetent to explain or confine the meaning of the words "minerals and ores" in the deed of May 18, 1871. The evidence would have been incompetent if it had related to the motives of the parties to the deed, sought to be established by the oral statements or negotiations between them prior to or contemporaneous with its execution.

The words of a deed, unambiguous in themselves, cannot be controlled by proof that the parties used them with a definite and limited meaning for the purpose of that particular instrument. Such proof might, under some circumstances, be competent in an action between the parties to reform the instrument, but not in determining the rights of the parties under the instrument as written. The incompetency of the evidence received as to the motives of the original grantees and of their statements as to what they intended to purchase or had purchased is still more manifest in view of the fact that they were disclosed and the statements made to third parties not connected with the sale. See *Voorhees* v. *Burchard,* 55 N. Y. 98.

The defandants were also permitted, under objection, to give evidence of witnesses, who lived or had owned property in the Champlain valley, that the word "minerals" was understood, "about there," to mean iron ores. It is unnecessary to determine in this case whether the usage or under-

standing in a particular district of the meaning of words used in a deed of mining property, which limits and controls their general meaning, is admissible for the purpose of fixing rights thereunder. It is sufficient to say that the evidence offered and received upon that subject in this case only went to the extent of showing that certain persons understood that the term "minerals," when used, did not include granite, but ores containing metals. The evidence was quite insufficient to establish a settled and recognized usage which shall override the legal meaning of the word. It was not shown that any transaction had taken place based upon the alleged usage, or that such usage was known to either of the parties to the deeds of 1871. In a mining case (*Tucker* v. *Linger,* 21 Ch. Div. 18), JESSEL, M. R., speaking of a custom relied upon in that case, said: "The custom must be collected, not from what witnesses say they think the custom is, but from what was publicly done throughout the district." See *Railway Co.* v. *Robinson,* 37 Ch. Div. 386, and remarks of the Vice Chancellor in *Darvill* v. *Roper,* 3 Drew. 301.

Putting aside, therefore, the extraneous evidence received upon the construction of the words "minerals and ores" in the deed of 1871, the questions arise (1) whether, under a grant of "minerals," on specified premises, granite is included in the absence of limiting words; and (2) whether if comprehended in the general term, it is excluded from the deed of May 18, 1871, by reason of the context, in connection with the fact that it can only be got by quarrying. It is plain that an owner of land who grants the minerals to another does not use the word as synonymous with mineral substances, because, if this meaning was attached to the grant, it would amount to a grant of the whole land, as the soil and all below it would be embraced in that description.

The question of what are minerals within a grant or

reservation of mines and minerals has been frequently considered by the English courts, and the almost uniform conclusion has been that the word includes, not only metals and metal-bearing rock, but anything mineral in character which can be got by mining. In one of the cases (*Earl of Rosse* v. *Wainman*, 14 Mees. & W. 859), which was affirmed (2 Exch. 800), the question arose under a reservation to the lord of the manor, in an inclosure act, of "all mines and minerals" lying within or under the common or waste lands, inclosed by the act, and it was held that beds of building stone were within the reservation. PARKE, B., in his opinion, said: "The term 'minerals,' here used, though more frequently applied to substances containing metals in its proper sense includes all fossil bodies or matters dug out of mines."

In *Bell* v. *Wilson*, 1 Ch. App. 303, under a conveyance of land reserving to the grantor "all mines or seams of coal and other mines, metals, or minerals," it was held that the reservation included freestone. *Hext* v. *Gill*, L. R. 7 Ch. App. 699, is an important case on the subject, because MELLISH, L. J., in his opinion, formulates, as the result of the adjudged cases, the principle upon which the cases proceed, and which has been followed and applied in several subsequent cases. That was a case of a reservation, in a private grant by the lord of a manor, of "all mines and minerals within or under the premises," and the question was whether beds of china clay, the product of the disintegration of granite, not known to exist in the land at the time of the grant, were embraced within the reservation, and the court decided that they were. MELLISH, L. J., said: "The result of the authorities, without going through them, appears to be this, that a reservation of 'minerals' includes every substance that can be got from underneath the surface of the earth, for the purpose of profit, unless there is something

in the context or in the nature of the transaction to induce the court to give it a more limited meaning."

The same principle was expressed in another form by BOWEN, L. J., in the case of *Earl of Jersey* v. *Guardians, etc.*, L. R. 22 Q. B. Div. 555, following the case of *Hext* v. *Gill, supra,* in which he said that the word applies to all substances of a mineral nature which have "a use or value of their own, independent of their being constituents of the soil." The question in that case was whether, under a reservation in an ordinary grant of "all mines of coal, culm, iron, and all other mines and minerals whatever, except stone quarries within and under," etc., brick earth and clay were reserved, and it was held that they were.

LORD ROMILLY, in *Railway Co.* v. *Checkley,* L. R. 4. Eq. Cas. 19, construing a reservation in an act for the compulsory taking of land for canals, of "all mines and minerals within and under the land," in which the question was whether the right to quarry paving stones was reserved, said: "Stone is, in my opinion, clearly a mineral, and, in fact, everything, except the mere surface, which is used for agricultural purposes; anything beyond that which is useful for any purpose whatever, whether it is granite, marble, fire clay, or the like, comes within the word mineral, when there is a reservation of the mines and minerals from a grant of land. Every species of stone, whether marble, limestone, or ironstone, comes, in my opinion, in the same category."

We shall refer only to another English case, the latest on the subject (*Attorney-General* v. *Welsh Granite Co.,* 35 Wkly. Rep. 617), decided in 1887, which held that granite was a mineral within a reservation of "mines and minerals."

There are but a few American cases which we have found bearing on the subject. In *Moore* v. *Brown,* 16 N. Y. Sup. 592 ; S. C., 139 N. Y. 127, 34 N. E. 772, it was assumed, both in the supreme court and in this court, that garnet discovered in Essex county on state lands was a

"valuable mine or mineral" and subject to a claim under chapter 411 of the laws of 1890. In *Hartwell* v. *Camman*, 10 N. J. Eq. 128, it was held that "paint stone," useful for grinding into paint, procured by mining, passed to the grantee of "mines and minerals," although its existence was not known at the time of the grant, but copper mining had before the grant been to some extent prosecuted on the premises.

Upon the authorities, we think we should not be justified in holding that granite was not embraced in a reservation or grant of "minerals," in the absence of qualification. It is, no doubt, true that this word, in its more common application in a grant of "minerals," would be deemed to refer to metallic substances. This, perhaps, grows out of the fact that mining is to a great extent prosecuted for the purpose of obtaining gold, silver, iron, and other metals, and grants of "minerals" or reservations thereof in conveyances of public lands are most frequently made with reference to mineral-bearing ores or deposits. But it would be an unwarrantable limitation of such a grant or reservation, to exclude from its operation beds of coal or other nonmetallic mineral deposits of commercial value, or to confine it to such minerals as were known or supposed to be on the premises at the time.

The grant or reservation of minerals in a deed contemplates substances to be severed and taken away from the premises, and it is difficult to suppose that the parties to such a deed intended to exclude from the grant any description of valuable mineral which would come within the legal meaning of the word, which might thereafter be discovered.

We are of opinion, therefore, that the words "minerals and ores," in the grant of 1871, standing alone, would include the granite upon the premises. But these words do not stand alone, but are connected with a context which clearly indicates, in our judgment, that the parties had in view only

such minerals as are to be got by mining in the ordinary sense of that term; that is, by underground, and not by open, workings. The grantor, Baldwin, owned the fee of the land. He did not part with his general title to the surface, but he granted special rights therein for the purpose of effecting the grant of the "minerals and ores." He accompanied these words with a specification of the rights granted,—that is to say, rights essential to and connected with usual mining operations,—and in respect to the surface he granted "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores."

The evidence is, and the fact would be sufficiently manifest in the absence of affirmative proof, that granite can only be obtained by open quarrying to the destruction of the surface so far as the granite bed may be uncovered. We think the reasonable construction of the grant limits the rights of the grantee to minerals obtained by underground working and as granite is not so obtained, it did not pass under the conveyance of 1871.

The principle of construction is stated by TURNER, L. J., in a case already referred to, speaking of the question whether freestone was a mineral and included in the reservation in that case. He said it must be deemed included, unless "either that the freestone is not a mineral, or that, being a mineral, the nature or context of the deed shows that it was not intended to be included." The context of the deed here furnishes, we think, the evidence that granite was not intended to be included. It may be that, if we followed some English cases, the conclusion would be that the granite did pass, but that it could not be taken by open quarrying. *Bell* v. *Wilson, supra; Hext* v. *Gill, supra.* Instead of recognizing this barren right we prefer to place our judgment on the ground that, under this grant, no title to the granite passed at all.

We have been referred to several English cases where the

right of open quarrying has been held to accompany a grant or reservation of mines and minerals. The cases generally have arisen on the construction of reservations contained in acts of parliament of rights to landowners whose land has been compulsorily taken for public purposes or by public authority.

In every case which has come to our attention involving the right of open quarrying, it has been sustained upon some special language in the act which indicated that the right of open quarrying was intended to be reserved. See *Railway Co.* v. *Checkley, supra; Railway Co.* v. *Robinson,* 15 App. Cas. 19; Id., 37 Ch. Div. 386; *Attorney-General* v. *Welsh Granite Co., supra; Earle of Rosse* v. *Wainman, supra.* In *Railway Co.* v. *Robinson,* 15 App. Cas. 27, LORD HERSCHELL said: "In such agreements, in the absence of a distinct indication of the contrary intention, it is always to be assumed that the reserved mines are only to be worked in such manner as is consistent with the surface remaining undisturbed. And if this be true of minerals lying deep below the surface, it would be obviously out of question to permit it to be disturbed by winning minerals which can only be wrought by surface operations."

For the reasons herein stated the judgment below should be affirmed. All concur.

Judgment affirmed.

OLIVER N. KOEN ET AL. v. F. W. BARTLETT ET AL.

(41 West Virginia 559; 23 S. E. 664. Supreme Court of Appeals. December 11, 1895.)

Life tenant takes all royalties. An owner in fee simple makes an oil and gas lease for a term of five years, and as much longer as the premises are operated for oil and gas, or the rent for failure to commence operating is paid for, among other things, one-eighth part of all oil produced and saved, to be delivered in the pipe lines to the credit of the lessor. The lessor then sells and conveys one undivided moiety of the one-sixteenth part of all the oil produced and saved. Afterwards, but before any oil is bored for or produced, the lessor sells, grants, and conveys the land in fee simple to his six children, to each one a part, by metes and bounds, in consideration of natural love and affection, by deed of general warranty, "except that the party of the second part takes the same subject to any lease for oil or gas made by the party of the first part or any sale of royalty for oil or gas made by him;" and, by the same deed, he retains full control of said land in all respects, and for all purposes, during his life-time. Soon thereafter oil wells are bored, and oil produced, saved, and put in the pipe lines in large quantities. *Held*, the one-eighth royalty goes of right to the tenant for life and his grantees, during the continuance of the estate for life, and not to the owners in fee of the estate expectant thereon.

[1]**Life tenant has right to full enjoyment.** The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during the existence of such estate.

(Syllabus by the Court.)

---

[1]Division of royalties on oil lease between tenant for life and remainder man. *Blakley* v. *Marshall*, 174 Pa. 425; 18 M. R. 350.

Life tenant cannot let oil or gas lease on land never previously operated for either mineral. *Marshall* v. *Mellon*, 179 Pa. 371; 18 M. R. 548.

Life tenant cannot lease unopened mines. An abandoned mine is an unopened mine. *Hook* v. *Garfield Co.* 112 Iowa 210; 83 N. W. 963.

Lease of gas well by life tenant and part of the remaindermen—measure of damages in such case. *Gerkins* v. *Kentucky Co.* 23 Ky. L. R. 2415; 67 S. W. 821.

Appeal from Circuit Court, Marion county.

Bill by Oliver N. Koen and others against F. W. Bartlett and another for injunction. From a decree for plaintiffs, defendants appeal. Reversed.

ALFRED CALDWELL, W. P. HUBBARD, W. S. MEREDITH, JOHN BASSEL, RAPHAEL HAYDEN, and FRANK HAYDEN, for appellants.

JOHN A. HUTCHINSON, A. B. FLEMING, U. N. ARNETT JR. and CHAS. POWELL, for appellees.

HOLT, Pres. F. W. Bartlett and H. P. Brand, appellants on appeal from a final decree entered by the Circuit Court of Marion county on the 26th day of May, 1894, giving Koen the oil in question, as against Bartlett and Brand, the adverse claimants. On the 19th day of September, 1892, defendant Elijah Kerns was the owner in fee simple and occupant of a tract of land of 75 acres situate in Marion county, on Whetstone run, within the productive part of the Mannington oil field, as shown by the event. On that day he executed to C. S. Nay a lease for that part north of the county road, to mine and operate for oil and gas for the term of five years, and as much longer as the premises might be operated for oil and gas, at a royalty of one-eighth of the oil delivered in the pipe line. On the 4th day of March, 1893, Nay sold, transferred, and assigned his lease to plaintiff O. N. Koen. By deed dated 28th September, 1892, Elijah Kerns had sold and conveyed to O. N. Koen the undivided moiety of the one-sixteenth part of all the oil and gas produced and saved from said land so leased. By deed dated 30th September, 1892, O. N. Koen sold and conveyed one undivided two-thirds of his interests conveyed to him by Kerns to Thornton F. Koen

and J. T. Koen. Oliver N. Koen, by deed dated October 5, 1893, sold and assigned the Nay oil lease to the South Penn Oil Company, who opened the mine, found oil, and are producing it in large quantities. Elijah Kerns, by six separate deeds, dated December 3, 1892, for natural love and affection, sold and conveyed in severalty, by metes and bounds, to his six several children, in fee simple, in expectancy on the grantor's life estate thereby retained and reserved to himself, the said tract of land leased as aforesaid. Whatever interests these expectant owners of the inheritance had, came by various conveyances to the plaintiffs, O. N. Koen et al. These deeds to the children are all alike, and any one will answer our present purpose:

"Elijah Kerns to Emeline Hays. Deed.

"This deed, made this 3d day of December, in the year 1892, between Elijah Kerns, of Marion county, West Virginia, grantor, of the first part, and Emeline Hays, of the same county and state, grantee, of the second part, witnesseth: That for and in consideration of the love and affection of the said Elijah Kerns for his said daughter, Emeline Hays, formerly Emeline Kerns, and other valuable considerations, the party of the first part does grant and convey unto the party of the second part the following described real estate, to wit: A tract or parcel of land lying on Whetstone run, in Mannington district of Marion county, adjoining lands of Rachel A. Jones, M. E. Holbert, C. C. Fox, and Nimrod Hays, and bounded as follows: 'Beginning at a stone by the road, and, with line of said Rachel A. Jones, S., 84 E., 38 poles, to pointers; thence, with Holbert's, S., 16 W., 36½ poles, to pointers, to C. C. Fox; and with his line, N., 71 W., 33½, to stone; and, with the road and Hays' line, N., 50 W., 18 poles, to stone; N., 63 E., 10 poles, to stone; N., 34 E., 16 poles, to the

beginning,—containing nine (9) acres, more or less, with its appurtenances and privileges. And the party of the first part covenants with the party of the second part that he has good right and title to said property, and that they will warrant generally the same, except that the second party takes the same subject to any lease for oil and gas made by said first party, or any sale of royalty for oil or gas made by him, and that the said first party retains full control of said land in all respects and for all purposes during his lifetime, and the second party takes said land as her full share of said Elijah Kerns' real estate. Witness the following signature and seal.

his

"Elijah X Kerns. [Seal.]"

mark

Elijah Kerns, by deed dated 18th November, 1893, in consideration of $2,400, sold, granted, and conveyed, by deed of general warranty, to F. W. Bartlett, H. P. Brand, and another the undivided one-sixteenth part of all oil and gas in and under said tract of land of 75 acres. This one-sixteenth of the oil which the South Penn Oil Company has produced, and is now producing, and putting in the pipe line, is the matter now in controversy. The plaintiffs, O. N. Koen and others, claim it by virtue and effect of the deeds from Kerns to his children. F. W. Bartlett and H. P. Brand claim it by virtue of the above deed from Kerns, the life tenant, by reservation. Koen claims it as having passed to the children as owners in fee in expectancy by such deeds. Koen filed his bill to prohibit the pipe line from delivering it or its proceeds to Bartlett. Bartlett answered, setting up his title as the owner. The intermediate court, by decree of 3d March, 1894, put it in the hands of a receiver to sell, and hold the proceeds for the one who should be held to be entitled. The intermediate court, by decree of 26th of May, 1894,

held that Bartlett and Brand were not entitled to the said one-sixteenth of said oil in the pipe lines, but that plaintiffs, O. N. Koen and others, were entitled thereto, and decreed accordingly. On appeal to the circuit court, by decree of December 4, 1894, the decree of the intermediate court was affirmed, and Bartlett and Brand appealed. The point in dispute turns on the legal effect of the deeds from Kerns to his children.

It is conceded on both sides that Elijah Kerns gave a right to mine for oil and gas, and that the South Penn Oil Company has produced, and is producing it lawfully, and placing it in the pipe line, as profits produced and issuing from the mines of the freehold, not opened in fact until the—day of ——, 1893, after the conveyance to the children. It is conceded on both sides that, by these deeds to his children, Kerns reduced himself to a tenant of a conventional life estate, seised of the present freehold estate in possession, subject to the oil lease; while his children became the owners in fee in expectancy, vested in right of present ownership, but not having the right of present possession and enjoyment. See *Hurst* v. *Hurst,* 7 W. Va. 289, 339. Whether it is with or without impeachment for waste is, in the view here taken, immaterial. That a fee may well be granted with reservation of the usufruct for life, see *Cribb* v. *Rogers,* 12 S. C. 564; *Waugh's Ex'rs.* v. *Waugh,* 84 Pa. St. 350; *Doe* v. *Brady,* 2 Dev. 395; *Hatch* v. *Thompson,* 3 Dev. 411; *Hodges* v. *Spicer,* 79 N. C. 223. Bearing on the question involved, we have, among others, the cases of *Findlay* v. *Smith,* 6 Munf. 143; *Crouch* v. *Puryear,* 1 Rand. 258; *Macaulay's Ex'r* v. *Land Co.* 2 Rob. (Va.) 507, 525; and *Williamson* v. *Jones,* 39 W. Va. 231, 19 S. E. 436. Upon the strength of these cases, it is conceded by both parties that mines of oil and gas in place are land, and, as such, go with the inheritance; and it must be conceded that the life tenant is vested with the ownership thereof as land, as being seised of the im-

mediate freehold in his possession, which possession extends from top to bottom, to the subsurface as much as to the surface,—in other words, to the land as a whole,—for the tenant for life has a freehold, as well as a tenant in fee (Co. Litt. 43b; 4 Com. Dig. 62); and that the owners of the inheritance have no more right to approach by a tunnel, and break and enter his subsuperficial close than they have to break and enter his close on the surface. Their estate of inheritance is vested in right of interest, but not in right of enjoyment. Their estate is expectant on the determination of the life estate. It is the duty of the life tenant to spare and preserve the corpus of the inheritance, and of the owners of the fee in expectancy to wait, for they have no present right of use and enjoyment, and cannot exercise any right by anticipation; and their respective duties point out their respective rights. It is further conceded, on the strength of these cases and of the books generally, that if these mines of oil and gas had been open when Kerns, by cutting down his fee, came in as tenant for life of the immediate freehold, then he would have a right to work them during the continuance of his estate, and take the issues and profits thence produced; for these two are derivative parts of one estate; each, in quantity of ownership and order of enjoyment, is measured and determined by time; and, though both are vested in right, the life tenant has the hither segment,—the immediate freehold,—and therefore the sole right to hold, use, and enjoy. And, if the mine is "open" when he comes in, then we conclude that the one who had the right to say has, by his actions, which speak louder than words, manifested his intention that it may be worked. Hence the life tenant may lawfully mine, sever, and convert the mineral from land into personalty; and this is something in which the owner of the expectant estate of inheritance has no right. He has a vested right in it as land,—nothing more,—and, if the severance is unlawful, may sue at law, enjoin in equity, and have an account. *University*

v. *Tucker* 31 W. Va. 621, 8 S. E. 410. But when, by lawful severance, it ceases to be land, his right ceases, and the owner of the immediate freehold takes the issues and profits; for, under the law, he has a right to the full enjoyment and use of the land and all its profits during his estate therein. 2 Bl. Comm. 122; *Williams* v. *Pearson* (1862) 38 Ala. 299, 309; *Crouch* v. *Puryear,* 1 Rand. 258; 1 Minor, Inst. 54b; Williams, Real Prop. (17th Ed.) 127; 1 Crabb, Real Prop. § 100; Tied. Real. Prop. §§ 2, 75; Kerr Real Prop. § 682; *Jackson* v. *Van Hoesen,* 1 Shars & B. Lead. Cas. Real Prop. 191, 206; McSwinney, Mines pp. 46, 47; 2 Minor, Inst. 602; *Eley's Appeal* (1883) 103 Pa. St. 307. The rule is well settled that a tenant for life, when not precluded by restraining words, may not only work open mines, but may work them to exhaustion; and it is settled law that the rents of an open mine are income and go to the tenant for life. *Rankin's Appeal* (Pa.) 16 Atl. 82. Lawfulness of severance and conversion into personalty seem to be the reason of the doctrine of the life tenant's right to the rents and profits produced from open mines. A mine lawfully leased to be opened is an "open mine," within the reason of the rule as laid down in these cases; and when lawfully opened and worked, as in this case, during the time that the freehold estate of the life tenant continues, the profits issuing therefrom, thus lawfully severed and produced, belong of right to him; for the term "profit," in law, comprehends the produce of the soil, whether it arise above or below the surface, including product of mines, as well as the herbage growing on the surface.

In the latter part of the clause of general warranty the grantor, Elijah Kerns, in the deeds to his children, makes an exception requiring the grantee to take subject to the lease for oil and gas and his sale of royalty; and it is said that inasmuch as the grantor stops there, not excepting the unsold part of the royalty, therefore he meant it to go with the estate in fee in expectancy, granted to his children. But

the answer is: that was the place to except what he had parted with, and what he reserved and retained found its proper place in the clause of reservation, retaining a life estate, and this oil lawfully severed as an incident thereof.

This, in my view, decides the case in favor of Bartlett and Brand, and requires the two decrees they complain of to be reversed, for they are the grantees of the life tenant, and, as to the one-sixteenth of the oil, have succeeded by purchase to his rights.

ELIZA ERSKINE ET AL. v. FOREST OIL CO.

(80 Federal 583. Circuit Court, Western District of Pennsylvania. December 12, 1895.)

[1]**Destructive trespass not always enjoinable.** In Pennsylvania, equity has no jurisdiction of a bill to restrain the operation of oil wells, or the taking of oil therefrom, where the complainant's title is purely legal, the respondent is solvent, and there are neither complicated accounts nor such irreparable injury as warrants interference by injunction.

[2]**Adequate remedy at law.** The substantial purpose of such a bill being to recover possession of the wells, the remedy by ejectment, aided by writ of estrepement under the state statutes, is full and adequate.

Discovery is not, ordinarily, an independent ground of equitable relief, and where a bill presents no other ground for interference equity will not take jurisdiction merely because discovery is prayed for.

KNOX & READ and J. H. BEAL, for complainants.

R. W. CUMMINS, for defendant.

BUFFINGTON, District Judge. On December 18, 1894, Eliza Erskine, a citizen of the state of Ohio, filed this bill

[1]*Crescent Co.* v. *Silver King Co.* 14 Utah 57; 45 Pac. 1093.

[2]*Heyward* v. *Farmer's Co.* 42 S. C. 138; 19 S. E. 963; 20 S. E. 64.

Equity will not enjoin a lessee alleged to have forfeited for nonpayment of royalty. Lessor's relief is clear at law for the land by ejectment and for the rent by assumpsit. *Hoch* v. *Bass*, 133 Pa. 328; 19 Atl. 360.

Not allowed against cutting timber where the trespasser is solvent, and the timber not essential to a going mine. *Heaney* v. *Butte Co.* 10 Mont. 590; 27 Pac. 379.

Will not issue where defendant has fair title. *Smith* v. *Jameson* 91 Mo. 13; 3 S. W. 212.

Order for, refused where equitable defense may exist and defendant able to pay damages. *Georgia Co.* v. *Davitte*, 79 Ga. 627; 4 S. E. 873.

A single act of trespass will not justify an injunction. *Parker* v. *Furlong*, 37 Oreg. 248; 62 Pac. 490.

in equity against the Forest Oil Company, a corporation of the state of Pennsylvania, setting forth, inter alia, that William Crawford died in 1846, and by his will bequeathed a certain farm in Washington county, Pa., to his son Matthew Crawford and to his children; that Matthew died on September 30, 1894, and the complainant was one of his 13 children; and that since his death the respondent company entered on said farm, and took possession of four producing oil wells, and of the oil since produced therefrom. The bill prayed first for an injunction to restrain respondent from entering on the premises, from interfering with the wells, from carrying away the oil or removing any machinery, tools, or fixtures from the premises. It also prayed for a receiver, for an account, discovery, and general relief. The contention of complainant is that by the will Matthew Crawford took an estate for life only, with remainder to his then and after born children. The answer alleged the will vested no estate whatever in the children, but did vest the fee in Matthew; that on the death of his father, Matthew accepted the devise, entered into and retained sole and exclusive possession of the farm until March 20, 1892, when the Woodland Oil Company entered thereon to operate for gas and oil, as assignee of a lease made by Matthew Crawford on December 4, 1890, for it and 33 acres adjoining, to T. J. Vandergrift, in consideration of $500 cash and one-eighth of the oil to be produced thereon for three years, or "as much longer as oil and gas is found in paying quantities thereon;" that Matthew Crawford, at the time of giving the lease, claimed to be the sole and absolute owner of the premises; that the company began drilling a well about March 20, 1892, and obtained oil in paying quantities about June 24, 1892; that between then and November 8, 1894, it drilled three other wells, all of which produced and are likely to produce oil for some time; that in said operations it had expended $30,000; that Matthew Crawford, up to the time of his death, received his one-

eighth royalty; that on November 27, 1894, the Woodland Company assigned the leasehold to the respondent company; that since the death of Matthew Crawford the royalty has been run to a suspense account in the pipe line, because the heirs or devisees of Matthew Crawford could not agree to whom it was coming. It also alleged complainant had full knowledge of the lease and the operations thereunder, that she never made any objections, that the bill shows no case for equity, and prays such benefit as though the bill were demurred to. On April 22, 1895, petitions for intervention as parties complainant were filed by five other children of Matthew Crawford and the children of a sixth one, deceased, and the same day, on motion of complainant's counsel, no objection being made by respondent, it was ordered "that the said petitioners, and each of them, have leave, and leave is hereby granted to them, to intervene in this suit for their own interests and the interests of those whom they represent, and to that end to appear in the suit in the same manner and with like effect as if they were named in the original bill as plaintiffs having or claiming an interest in the matter therein in controversy."

Assuming, for present purposes, that, by the will of his father, Matthew Crawford took a life estate in the land, and his children took in remainder, and assuming the jurisdiction of the court is not ousted by the intervention of the additional parties, whose residence or citizenship is not stated, and who represent separate undivided interests in the land other than that of Mrs. Erskine, the original complainant, the paramount question still remains, is the case one of equitable jurisdiction? Assuming the complainants took in remainder the undivided seven-thirteenths of the land, yet the filing of the bill found the respondent in sole, exclusive, and adverse possession of it under claim of title, and such possession dating back to a time prior to the right of entry of complainants, and the alleged title having its origin in the grant

of the holder of a prior freehold estate, namely, Matthew Crawford, the life tenant. While the bill does not, in words, pray to acquire possession of the wells, yet in substance and effect that is its purpose. It seeks to restrain respondent from operating the wells or taking the oil, and these acts are, where oil and gas are concerned, the essential attributes of possession. The supreme court of Pennsylvania, in the case of *Gas Co.* v. *DeWitt*, 130 Pa. St. 250, 18 Atl. 724, after discussing the peculiar character of gas and oil and their production, say: "The one who controls the gas [the subject-matter of the case before it]—has it in his grasp, so to speak—is the one who has possession in the legal as well as in the ordinary sense of the word." A bill, then, which in substance would deprive one in possession of everything which constitutes possession, whatever it is in name, is in fact one to divest possession, or what is known as an "ejectment bill." In *Messimer's Appeal*, 92 Pa. St. 169, a bill was filed by parties claiming an undivided fourth in an oil lease and well against parties in possession. The respondent admitted complainants' title to an undivided eighth, and denied it as to the other eighth. Complainants did not ask to restrain respondent from operating the well, but prayed for a receiver and an accounting. In sustaining a decree dismissing the bill for want of grounds of equitable relief, the court say: "The case presented on bill and answer is simply the ordinary case of property claimed by one party (plaintiff) in the possession of another party (defendant). It is a mere ejectment bill, and there is nothing to give a court of equity jurisdiction." Such conclusion is in accord with other Pennsylvania cases. See *Long's Appeal*, 92 Pa. St. 179; *Coal Co.* v. *Snowden*, 42 Pa. St. 488; *Gloninger* v. *Hazard*, Id. 389. In the federal courts the line between law and equity, and consequently between legal and equitable rights and remedies, has been sharply defined, and strictly observed. The provision of the constitution vesting judicial powers "in cases in law and equity * * * between

citizens of different states" recognizes the distinction. A constitutional amendment insures the right of trial by jury "in suits at common law when the value in controversy shall exceed twenty dollars," and the sixteenth section of the judiciary act of 1789 provides "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law." And to such length have these provisions been extended that it has been held (*Allen* v. *Car Co.*, 139 U. S. 662, 11 Sup. Ct. 682): "If the court, in looking at the proofs, found none of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact, and give it effect, though not raised by the pleadings nor suggested by counsel." And rightly so, for we are here dealing with the constitutional right of the citizen, and, as was said by Mr. Justice Campbell in *Hipp* v. *Babin*, 19 How. 278, "whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury."

Applying that principle to the case in hand, what have we? There can be no doubt that the title claimed by Mrs. Erskine is a purely legal one. There is no trust relation between her and the respondent. She need call to her aid no equitable principles to establish or enforce her title. If it exists, it is created wholly and solely by a written instrument accessible to all parties. Being purely legal, as distinguished from equitable, it can be established and enforced in a court of law. Nor are any special grounds for equity interference shown; there are no complicated accounts; and, moreover, the liability to account at all is incidental to and dependent upon the prior question of title. Discovery is prayed for in the bill. But, apart from the fact that the proofs disclose no call for such relief, it is to be noted that ordinarily discovery is

not an independent ground of relief, but is incidental to and dependent on other grounds. Hare, Disc. §§ 6-8, and Story, Eq. Pl. § 331. Nor can the bill be sustained on the ground of avoiding a multiplicity of actions. Certain it is the original complainant was entitled to maintain ejectment for her undivided interest, and the act of April 13, 1807 (1 Brightly's Purd. Dig. p. 636, § 4), provides for the joinder of tenants in common in actions of ejectment in this state. Nor is the taking of the oil from the wells, under the facts of this case, to be adjudged such an irreparable injury as in some cases might warrant the interference of a court of equity by injunction. The respondent is concededly solvent, and the proofs tend to show that by the taking out of the oil on this tract it is prevented from being drawn away and taken out by other wells on adjoining lands. Moreover, in pending actions of ejectment the Pennsylvania statutes provide, by writ of estrepement, for all protection of land in litigation from spoliation.

After careful consideration, we are of opinion complainants' title is wholly a legal one, that ample remedy exists at law, that there are no special facts or circumstances in this case calling for the exercise of equitable jurisdiction, and that the bill is an ejectment one. With a disposition on our part to, if possible, retain jurisdiction to dispose of the case by construing the will, and end the controversy between the parties, we are unable to do so. The cases of *Hipp* v. *Babin*, 19 How. 278, *Whitehead* v. *Shattuck*, 138 U. S. 146, 11 Sup. Ct. 276, and others that might be referred to, block the way to a federal court assuming jurisdiction of what is in substance and real purpose an ejectment bill. If our conclusion in this regard is correct, the construction of the will of William Crawford must be passed upon in another case, and the propriety of our abstaining from any expression of our views thereon is apparent. A decree will be prepared dismissing this bill for want of jurisdiction, and without prejudice.

[1]TYLER MINING CO. v. LAST CHANCE MINING CO. ET AL.

(71 Federal 848. Circuit Court, Northern District of Idaho. Dec. 14, 1895.)

Right to draw in end line. When the outcrop of a vein passes through one end line and one side line of a location, the locator may draw in the other end line to the point of intersection of the vein with the side line, and abandon what lies beyond; and he will then have the same extralateral rights as if the claim had been so located in the first instance.

[2]**Where vein departs is real end line.** Even if the locator does not actually so draw in his end line, and abandon what lies beyond, a new end line will be considered as drawn at that point, and the claim will have the same extralateral rights as if it had been so located in the first instance.

[3]**Rights of prior location on vein across the strike.** Where a vein is so located as to have extralateral rights, but its dip carries the vein under a prior location which has the right to all its vein within its vertical lines—the prior location of such latter vein defeats the assertion of extralateral rights as to the ore within such vertical lines.

This was an action by the Tyler Mining Company against the Last Chance Mining Company, the Idaho Mining Company, and the Republican Mining Company.

[1]For review of Last Chance Tyler litigation see note *ante* p. 205.

[2]*Del Monte Co.* v. *Last Chance Co.* 171 U. S. 55; 19 M. R.—.

[3]*Argentine Co.* v. *Terrible Co.* 17 M. R. 109.

Lode crossing side lines loses its right to follow the dip. *King* v *Amy Silversmith Co.* 18 M. R. 76.

Where the side lines instead of the end lines cross the course of the lode the side lines are to be treated as end lines. *Watervale M. Co.* v. *Leach*, 17 M. R. 568.

Construction of rights of junior location on the apex as against prior patents across the vein. *Bunker Hill Co.* v. *Empire Co.* 109 Fed. 538; 21 M. R.—. Modified 114 Fed. 420.

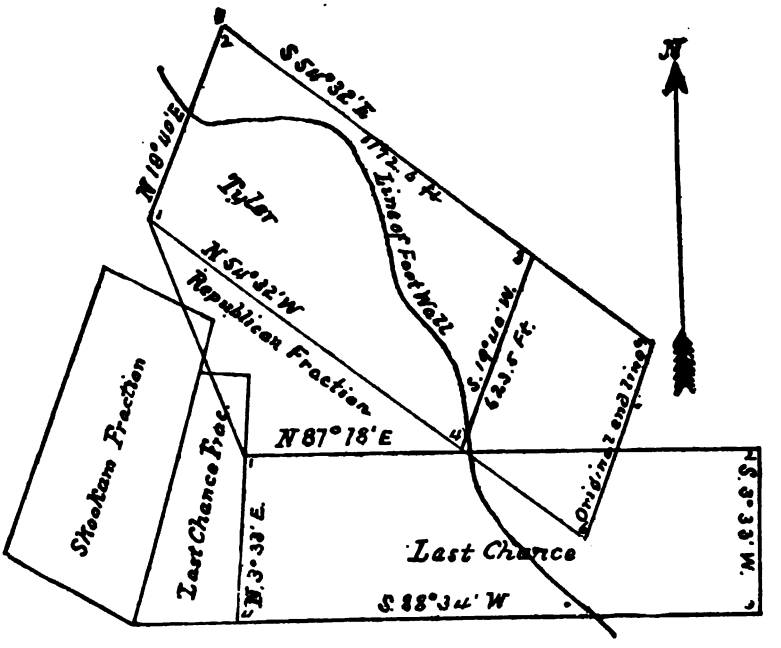
Possession of the apex is possession to the full extent of the extralateral rights of the claim. *Empire Co.* v. *Bunker Hill Co.* 121 Fed. 973.

The apex owner has extralateral rights to all portions between his end planes protracted, although a part be cut off by an intervening apex right. *Id.*

JOHN R. MCBRIDE, for plaintiff.

W. B. HEYBURN, for defendants.

BEATTY, District Judge. The first trial of this cause in this court resulted in a judgment on April 11, 1892, in favor of defendant the Last Chance Company, which, on error to the circuit court of appeals, was reversed because of the admission in evidence of a prior judgment; 4 C. C. A. 329, 54 Fed. 284. Upon a new trial had in pursuance of the judgment of the appellate court, the plaintiff, on March 6, 1893, recovered judgment against all the defendant companies, which on error to the circuit court of appeals, was affirmed (9 C. C. A. 613, 61 Fed 557), whereupon the cause was taken to the supreme court by certiorari, where the action of the lower courts in excluding as evidence the judgment above referred to was held error, and the cause was remanded for a new trial (157 U. S. 683, 15 Sup. Ct. 733); and it is now, at the October term, 1895, again submitted to this court, upon an agreed statement of facts. By such statement it is provided that the diagram of the premises found on page 331, 4 C. C. A., and 285, 54 Fed., may be treated as a part of the statement, a substantial copy of which is as follows:



Among the facts stipulated by the parties are that the plaintiff owns the Tyler mining claim, as described in its complaint, being the tract within the Tyler boundaries, 1, 2, 3, 4, in the diagram; that the defendant Last Chance Company owns the Last Chance claim, as described in the pleadings; that the vein found in the Tyler and Last Chance claims dips "southwesterly at an angle of about 45° from the horizontal;" that the line of the vein, as indicated on the diagram is approximately the line of the footwall; "that the said vein passes through the southerly side line of the Tyler claim, as originally located, and crosses the northwesterly end line thereof," and, "after crossing the said southerly side line of the Tyler claim, passes through, and outcrops upon,

the Last Chance claim, as shown upon the diagram;" that the Republican fraction mining claim was duly located on the 1st of November, 1885, and that the vein discovered therein "is the same vein which passes out through the southerly side line of the Tyler claim" and that this vein, on its dip, passes under the Last Chance fraction and Skookum claims. By these conceded facts, and the adjudications of the courts, I must be guided, even to the abandonment of a view as to underground rights which I had hoped might prevail.

1. The chief issue is between the plaintiff and the Last Chance Company. To that between the plaintiff and the other defendants, very little attention has at any time been given by the counsel, and I think it has never been referred to by the appellate courts. The plaintiff's Tyler claim, as originally located, on September 20, 1885, and for which application for patent as first made, was as represented in the diagram, within the boundaries 1, 2, 5, and 6; but the application was amended and patent received for the ground as now claimed, and included within the lines 1, 2, 3, and 4. It will be observed that the vein passes through the two end lines of the claim as now owned by plaintiff. Plaintiff, so holding its claim, contends that it is entitled to follow the vein on the dip between the prolonged parallel planes of the end lines under all the claims of the defendants. The original application for patent to the Tyler claim was adversed by the Last Chance, which resulted in the triangular piece in conflict with the Last Chance being held as a part of the latter, thus leaving the Tyler claim of irregular shape, with five boundary lines; and the defendants claim that this irregularity, and the further fact that the Tyler vein passes out of the claim through one of its side lines, as originally located, operate to debar the plaintiff from following the ledge on its dip beyond a perpendicular plane passed through the southerly side line of its claim. If, in this hearing, we

are to consider the Tyler claim as it is stipulated the plaintiff now owns it, the suggested irregularities are eliminated, and we have a claim regular in form, with its vein passing through the two end lines. Moreover, the court of appeals, in 4 C. C. A., and 54 Fed. *supra,* distinctly held that the plaintiff could abandon a part of its claim and draw in the end line, as it did; and, in effect, the court held that under those circumstances the plaintiff had all the extralateral rights it would have had, had the Tyler claim been originally located as now claimed and held. That view of the court of appeals has not been criticised by the supreme court.

2. If, however, the agreed statement, "that the said vein passes through the southerly side line of the Tyler claim as originally located," so operates that this case must be considered as it would be, had the plaintiff never drawn in its end line, then, by the weight of authority, the result would not be different. In the case last cited, on page 338, 4 C. C. A., and page 292, 54 Fed., the court held "that an end line may be drawn * * * at the point where the apex of the lode crosses the side line of the surface location." Also, it has been held in a number of recent cases that, when a ledge passes through an end and a side line of a location, a new end line will be drawn where the ledge crosses the side line, and, between the prolonged planes of the located and constructed end lines, the locator may follow his ledge on its dip beyond its side line. This case, 9 C. C. A. 613, 61 Fed. 560, 564; *Consolidated Wyoming Gold Min. Co.* v. *Champion Min. Co.,* 63 Fed. 541, 546; *Del Monte Mining & Milling Co.* v. *New York & L. C. Min. Co.,* 66 Fed. 212; and the recent case of *Fitzgerald* v. *Clark* (Mont.) 42 Pac. 273; and the supreme court, in 157 U. S. 696, 15 Sup. Ct. 733, says, "There has been no decision (by that court) as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line," which the court suggests is a very inter-

esting and somewhat difficult question. The court does not answer it, but suggests the queries:

> "Is that a case for which no provision has been made by statute? Are the parties left to the old rule of the common law, that the owner of real estate owns all above and below the surface, and no more? Or may the court rely upon some equitable doctrine, and give to the owner of the vein the right to pursue it on its dip, in whatever direction that may go, within the limits of some equitably created end lines?"

3. What the defendants now ask is, in effect, the application of the common-law rule. To do this, we must find some warrant for it in the statute, or at least nothing against it. If there is any right emphatically granted by the mining laws, it is one in direct contravention of the common law. Section 2322, Rev. St., grants to the locator of a ledge (1) the right to follow it throughout its entire depth; (2) contrary to the common-law rule, to so follow it "outside the vertical side lines of the surface location;" and (3) when he so locates his claim that his ledge passes through his two end lines, there is no doubt that he can follow it on its dip indefinitely, and along its course for a distance equal to that between the two end lines. In other words, the right granted is to follow it downward wherever it may go, regardless of the vertical planes of his side lines, and for a length along its course equal to the length of apex within his surface limits restricted only by the vertical, extended planes of his end lines. What reason, under the law, can be assigned why these rights shall not apply when his location is such that his ledge passes through it in some other way than from end to end? The law does not say that his ledge must run from end to end, but he is granted this right of following "all veins, lodes and ledges throughout their entire depth, the top or apex of which lies inside of his surface lines." Upon the fact that an apex is within his surface lines, all his under-

ground rights are based. When, then, he owns an apex, whether it extends through the entire or through but a part of his location, it should follow that he owns an equal length of the ledge to its utmost depth. These are the important rights granted by the law. Take them away, and we take all from the law that is of value to the miner. Courts will not fritter them away by ingrafting into the law antagonistic common-law principles, or other judicial legislation. Is there any difficulty in applying these rights to a location wherein the ledge passes through an end and a side line? What are the planes that must then bound the underground rights? It will be conceded that the plane of the end line through which the ledge passes shall be one. The statute says the right to follow the ledge along its course underground shall be limited by the planes passed through the two end lines, but it is manifest that this rule cannot be followed when the apex of the ledge, before reaching the other end line, passes out of a side line, for it would give the locator more of the ledge underground than he has of apex. It would give him a portion of the ledge of which he does not hold the apex, and to hold that his ledge shall be cut off by the vertical plane of his side line is cutting off the right to follow it down which the law has given him. Instead thereof, to establish at the point where the apex crosses the side line a vertical plane parallel to the plane of the end line cut by the apex, and allow him to follow the ledge on its dip between these two planes, is not in violation of any provision of the statute, and gives the miner no greater rights than the statute intends he should have. The courts, by the cases above cited, have so held, and it is now held that the plaintiff can so follow its ledge as far as not in conflict with some prior right.

4. At the first trial of this cause the jury was instructed that the plaintiff could so follow its ledge, "unless it comes in conflict with some prior locator who had also located a

claim in such manner as the law will justify," which was affirmed by the court of appeals. 4 C. C. A. 329, 54 Fed. 294. So it is now held. But the Last Chance claim is prior in location to the Tyler, and it is located in such manner as the courts hold the law justifies. The court of appeals, on the page last above noted, says of the two claims:

"It therefore appears that both locations were made in such form and shape as has been recognized by the adjudicated cases upon these questions to entitle them to certain fixed and definite rights, to follow the ledge in its downward course; and the rights of the Tyler Company and of the Last Chance Company, in this respect, depend upon the question of their priority."

The supreme court, when considering this case (157 U. S., and 15 Sup. Ct., supra), after deciding only that issue which fixes the priority of location in the Last Chance, reversed and remanded it to this court for new trial. Opposing counsel differed as to whether the decision was a final one in favor of the Last Chance Company, or only determined the question of priority and left all other issues for trial. It is deemed unnecessary to review this question, for in either event, with the agreed facts in this case, the result must be the same. The Last Chance claim is prior. It is so located that courts generally say its owner is entitled to follow the ledge on its downward course between the vertical planes of what were located as its side lines. It must result that, as to the Last Chance location, the Tyler ledge cannot be followed downward further than to the vertical plane through the located north side line of the Last Chance. The defendant Last Chance Company is therefore entitled to judgment against the plaintiff for the possession of all the premises in dispute which lie between those planes which descend vertically from those two lines of the Last Chance which were located as its side lines, and it is ordered accordingly. That the issues between plaintiff and the defendants

the Republican and Idaho companies are, through prior proceedings in this cause, *res adjudicata,* counsel have not agreed, but I am of the opinion that they are unsettled. The Republican Fraction claim being owned by the defendant the Republican Mining Company, and being subsequent in date of location to the Tyler claim, it must follow from the conclusion above reached that the plaintiff can follow its ledge under the Republican Fraction claim, and it is allowed judgment accordingly. Doubting that the facts relative to the issue between the plaintiff and the Idaho Company are presented in this record, no determination of such issue is now made.

THE ENTERPRISE OIL AND GAS CO. v. NATIONAL TRANSIT CO.

(172 Pennsylvania 421; 33 Atl. 687. Supreme Court. Jan. 6, 1896.)

[1]Assumpsit against a co-tenant does not lie except on an express promise and on accounting a co-tenant is liable only for any excess received. The law of accounting between co-tenants in Pennsylvania reviewed.

Facts of the case. Several co-tenants of an oil lease assigned the lease to an operator who was to deliver to them a part of the product. One of the joint owners did not join in the assignment, and notified the assignee not to deliver any oil to his co-tenants. *Held*, (1) that the party not joining in the assignment was not entitled to his share of the oil without proving that his co-tenants had received more than their share; (2) that if he chose to affirm it, he must take his share with the others upon a distribution of the royalty after deducting all proper charges and expenses.

[2]Inconsistent positions. One cannot claim profits under a lease made by a firm, as a partner therein, and at the same time repudiate the lease because not joined in or assented to by him.

Appeal from Court of Common Pleas, Butler county; John M. Greer, Judge.

Action by the Enterprise Oil & Gas Company, a partnership, against the National Transit Company. From a judgment for defendant, plaintiff appeals. Reversed.

C. J. D. Strohecker, in the fall of 1889, was the owner of a number of oil and gas leases situate in Beaver and Butler

[1]Assumpsit allowed for accounting between co-tenants. *Winton Co.* v. *Pancoast Co.* 170 Pa. 437; 33 Atl. 110.

Rights of minority interest in mining claim. *Hawkins* v. *Spokane M. Co.* (Idaho) 28 Pac. 433.

Each tenant in common has the right to work. *McGowan* v. *Bailey*, 179 Pa. 470; 36 Atl. 325.

No accounting when title is in dispute between them. *Tecumseh Co.* v. *Camp*, 17 M. R. 388.

[2]*Genter* v. *Conglomerate Co.* 23 Utah 165; 64 Pac. 362.

counties. Among these several leases was a lease which he obtained from Keziah Allen on the 7th day of August, 1889. He, with others, conceived the idea of organizing a company (the plaintiff in this suit), called the Enterprise Oil & Gas Company. They drew up articles of copartnership, which were signed by a number of them, intending first to make it a limited partnership, but they abandoned the idea of a limited partnership, and never recorded the articles. Mr. Strohecker was the president of the partnership, and as such, together with others, divided the shares in the partnership into thirty-seconds, and fixed the price of each share at $100. In the month of October, 1889, Mr. Strohecker turned over all the leases, among them the Keziah Allen lease, in manner following: "Know all men by these presents, that I, C. J. D. Strohecker, do hereby set over and transfer all the within-described leases to the Enterprise Oil and Gas Company, their heirs and assigns, for their own separate use, for consideration elsewhere written. In witness whereof, I do hereby set my hand and seal, this 22d day of October, 1889." This assignment vested title to the leases in the Enterprise Oil & Gas Company, and was the only evidence that the members had any interest therein whatever. The Keziah Allen lease was for the period of one year, or so long thereafter as oil or gas was produced in paying quantities. The company did not feel able to operate that lease, and, a short time before it expired unless operated, they authorized the president to assign the same to J. M. Latchaw, reserving one-eighth of the oil. The assignment was in writing, as follows: "Know all men by these presents, that the Enterprise Oil and Gas Company, of Zelienople, do hereby set over, transfer, and assign the western half of these leases to J. M. Latchaw, his heirs and assigns, for the consideration mentioned in articles of agreement. October 17, 1890. Enterprise Oil and Gas Company, C. J. D. Strohecker, President. H. Weckbecker, Secretary. Witness: Fred Zehner, Jr." J. M. Latchaw,

the purchaser, formed a company called Latchaw Armor Company, and drilled one well on this lease, and obtained oil. The one-eighth of the oil was run into the lines of the National Transit Company, defendant, in the name and to the credit of the Enterprise Oil & Gas Company, as per agreement; and on the 1st day of October, 1893, the Enterprise Oil & Gas Company had over 1,000 barrels to their credit. Some time prior to the bringing of the suit, the Enterprise Oil & Gas Company called for their oil. Mr. Strohecker was the president of the company, and usually lifted the oil to its credit, and, after paying debts of the company divided the same to and among the several members. When he called for the company's balance produced from the Keziah Allen lease, the company defendant refused to deliver it, saying that one John T. Johnson had given them notice that he claimed the oil. Johnson was a member of the Enterprise Oil & Gas Company, and participated in its profits and management. Defendant company refused to deliver the oil, and on the 20th day of November, 1893, suit was brought.

LEV. MCQUISTION and J. C. VANDERLIN, for appellant.

R. P. SCOTT, for appellee.

MITCHELL, J. This case was unfortunately tried on a wrong theory throughout. The oil was received by the defendant for account of plaintiff, and so credited on the defendant's books. Prima facie, therefore, it belonged to plaintiff; and, though it would be a good defense to show that it was claimed by the real owner, yet such defense involved the burden of proof that the claimant had in fact the better title. This the defendant entirely failed to show. It defended on Johnson's title, or rather permitted him to do so in its name.

Johnson's interest, as agreed by all parties, was an undivided sixteenth. Whether it was a sixteenth in the partner-

ship, or a sixteenth in the leases as a tenant in common,—the issue on which the jury were permitted to find a verdict,—was, for the purposes of this case, entirely immaterial. In either aspect, as already said, his interest was undivided, and he never had any separate possession either of the land or of the oil. There was not only no evidence that this particular oil was his, but on the contrary a prima facies that it was the plaintiff's. It was delivered by their lessee to the defendant, as a carrier for them. The possession of the carrier was their possession, as against all the world but a claimant showing a better title. The utmost that Johnson showed, even on his own claim to be a tenant in common, was that as to one-sixteenth of the oil his title was the same, as good, but no better than that of the other 15 cotenants represented by the plaintiff. The status of the case, even in the most favorable light for Johnson, was the same as if he had been suing his cotenants for his share of the profits of the land.

The rights and remedies of tenants in common among themselves have been the subject of some discussion in this state. At common law, as each was entitled to the joint possession of the whole, there was no liability to account to each other, except upon an express agreement to act as bailiff, or an actual ouster, which would sustain an ejectment for restoration of possession and mesne profits. The act of 4 Anne (chapter 16, section 27) dispensed with the necessity of express appointment as bailiff, and gave an action of account against the cotenant "receiving more than comes to his just share or proportion." And in this state it has been settled, after some variance of opinion, that the action is not necessarily in account render, but, where there has been an express promise, it may be in assumpsit. *Gillis* v. *McKinney,* 6 Watts & S. 78. In *Borrell* v. *Borrell,* 33 Pa. St. 492, the majority of the court sustained assumpsit on an implied obligation to account; but this case was practically overruled in *Kline* v. *Jacobs,* 68 Pa. St. 57, where the subject was dis-

cussed by Sharswood, J., and the rule clearly laid down that there is no implied obligation to account for mere use and occupation by one tenant in common, who has by his title a right of possession of the whole, although it is joint, and that assumpsit can only be maintained on an express promise to pay rent or to account. The best summary of the law in our own books will be found in the admirably clear and accurate opinion of Judge Thayer in *Norris* v. *Gould,* 15 Wkly. Notes 187.

But all of our cases, including even those which have most favored the action in assumpsit, such as *Borrell* v. *Borrell, supra,* and *Luck* v. *Luck,* 113 Pa. St. 256, 6 Atl. 142, have held that, unless on an express promise of a liquidated sum, all the cotenant is obliged to account for is a share of the profits. The utmost, therefore, that Johnson could have recovered, if this had been a direct action against his cotenants, would have been the excess which they had received over their proper share of fifteen-sixteenths. But he was allowed to recover the whole of the oil in controversy, on the ground that, as a tenant in common of one-sixteenth he was entitled to one-sixteenth of the entire product of the lease, without having given a scintilla of evidence that any of his cotenants had received more than their due share. Under the evidence as it stood, there was no defense at all made out, and the jury should have been directed to find for plaintiffs for the full amount of the oil.

There is another difficulty in the way of Johnson's title in the present case. The oil in controversy was delivered by the lessee to his lessors, the plaintiffs, as rent under his lease. Johnson cannot affirm and repudiate the lease in the same breath. If he is a party to it, he must take his share, as the others do, upon a distribution of the rent, after deducting all proper charges and expenses. If he is not a party to the lease, he has no claim to any share in the rent, and must look to the lessee, as a cotenant who has not acquired his title.

Judgment reversed, and venire de novo awarded.

JOHN K. KELLY v. J. D. MARSHALL ET AL.

(172 Pennsylvania 396; 33 Atl. 690. Supreme Court. Jan. 6, 1896.)

[1]The sudden fluctuation in the value of oil leases makes time of the essence of all contracts concerning their sale.

[2]Facts of the case. Commissions. Plaintiff secured the right to sell on commission an oil lease at a fixed price. At his instance the price was reduced a number of times. His time was limited to a certain day. He failed to secure an offer to the limit. Shortly afterwards the owner sold to the same party with whom plaintiff had been negotiating. *Held*, that plaintiff had no claim for commission.

Appeal from Court of Common Pleas, Butler county; Ewing, Judge.

Action by John K. Kelly against J. D. Marshall and others to recover commissions for the sale of oil property. From a judgment for plaintiff, defendants appeal. Reversed.

J. D. MARSHALL, R. P. SCOTT and K. MARSHALL, for appellants.

W. D. BRANDON, JOHN M. THOMPSON and W. C. THOMPSON, for appellee.

FELL, J. The plaintiff was authorized by the defendants to sell for $70,000 an oil-producing property, on which there were a number of wells completed and one partly drilled. Upon his representation that the price was too high, it was afterwards reduced to $60,000, then to $55,000, and

[1]*Huggins* v. *Daley*, 99 Fed. 606. *Idaho Co.* v. *Union Co.* (Idaho) 47 Pac. 95. *Settle* v. *Winters* (Idaho) 10 Pac. 216. *Snow* v. *Nelson*, 113 Fed. 353.

[2]*Trickey* v. *Crowe*, (Ariz.) 71 Pac. 965.

finally to $52,500. The last reduction was made about one month after the plaintiff's employment, with the understanding that, unless the property was sold that day, it would be withdrawn, and his agency ended. He did not succeed in obtaining a higher offer than $47,500. This was declined by the defendants, and he was then notified that the property was withdrawn, and the parties to the negotiation separated and went to their homes, and the defendants resumed the drilling of the unfinished well, operations on which had been suspended during the negotiations. Eleven days after this the defendants sold the property for $50,000, the purchaser being the same person with whom the plaintiff had opened negotiations, and from whom he had obtained the offer of $47,500.

Upon the trial of an action brought by the plaintiff to recover commissions, on the ground that he had brought the parties together, and that his agency was the efficient cause of the sale, the jury was instructed that, as there had been no time fixed by the original agreement within which a sale should be effected, the plaintiff had a reasonable time within which to secure a purchaser, and that the defendants could not, within that time, revoke his agency, and relieve themselves of liability to pay the commission agreed upon. This instruction was repeated in the answers to the defendants' points, and is the subject of five of the assignments of error.

The plaintiff was not a real estate broker. He did not have charge of the property. His agency was not coupled with an interest, or founded upon a consideration. He had solicited the privilege of offering the property for sale. At his suggestion the price had been three times reduced, and finally, after a month of fruitless effort upon his part, a time limit within which a sale should be effected was fixed. The reason for withdrawing the property was stated to him. In the judgment of the owners its salable value was being

injured by its repeated offers in a limited market, and was certain to be affected by the result of other enterprises in the locality, and the defendants were delayed in the development of their own property by the suspension of operations on their unfinished well pending the negotiations for sale. The interest was a leasehold, liable to sudden changes in value, and the character of the property was such that time was of the highest importance in dealing with it, and, presumably, the essence of all contracts in relation to its sale. The remarks of Mitchell, J., in the opinion of the court in *Vincent* v. *Oil Co.*, 165 Pa. St. 402, 30 Atl. 991, have direct application to this case: "The nature of the property, as oil-producing, made it liable to fluctuate in value, which raises the presumption that time was of the essence of transactions concerning it; and the facts in regard to the wells in the immediate vicinity then going down show that a new development at any time might materially affect its value, and that this was understood by the parties."

Under the facts and circumstances, as shown by the testimony, we think it was the right of the defendants to revoke the plaintiff's agency in the manner and at the time at which they did so. Whether the revocation of the agency was made in good faith, or was a mere subterfuge to relieve the defendants from the payment of commissions, was an open question at the trial, and was for the jury. It may appear that the plaintiff, if not entitled to commissions as such, could still recover compensation for services rendered before the revocation of his agency. *Jaekel* v. *Caldwell*, 156 Pa. St. 266, 26 Atl. 1063; *Vincent* v. *Oil Co.*, *supra*. But the case was not tried upon that line.

The second, third, fourth, and fifth assignments of error are sustained, and *the judgment is reversed, with a venire de novo.*

JOHN J. STEINER v. WM. J. MARKS ET AL.

(172 Pennsylvania 400; 33 Atl. 695. Supreme Court. Jan. 6, 1896.)

[1]**Lessee lured to delay by landlord.** The lessor in an oil and gas lease will not be permitted to enforce a forfeiture of the lease for a delay of one day in the payment of rental, where by his acts and declarations he has lured the lessee into the belief that a forfeiture would not be enforced for so short a delay.

Jury question. Whether lessor's acts were such as to justify the lessee in believing that he waived strict performance is a question which should have been left to the jury on the facts.

Facts of the case. Where the lessor on one pay day told the lessee that he might as well have waited till tomorrow and on another occasion slipped away while lessee was going a short distance to get the money—he cannot be allowed to enforce a forfeiture for a single day's delay.

Appeal from Court of Common Pleas, Butler county; John Stewart, Judge.

Action by John J. Steiner against William J. Marks and another. From a judgment for plaintiff, defendants appeal. Reversed.

NEWTON BLACK and LEV. MCQUISTION, for appellants.

JOHN M. THOMPSON and W. C. THOMPSON, for appellee.

[1]For relief in equity against forfeiture and excuses for strict performance see *So. Penn Co.* v. *Edgell*, 48 W. Va. 348; 37 S. E. 596.

Where lessor boarded the men and assisted in the work long after the period of strict performance had passed he cannot suddenly enforce a forfeiture. *Duffield* v. *Michaels*, 102 Fed. 820.

Relief to lessee who had been forced to quit by false statement that the mine had been sold, the lease providing for surrender in such case. *Ober* v. *Schenck*, 23 Utah 614; 65 Pac. 1073.

Forfeiture may be waived by lessor's acquiescence in previous defaults. *Duffield* v. *Hue*, 17 M. R. 254.

Time of the essence in title bond, but may be waived when buyer allowed to expend labor on assurances of extension. *Presidio M. Co.* v. *Bullis*, 68 Tex. 581; 4 S. W. 860.

DEAN, J. On the 12th of April, 1893, Marks and McCandless, two of defendants, Bartley being their employe, by writing under seal, leased from Steiner, plaintiff, for a term of 10 years, the oil and gas under his farm of 87 acres, in Middlesex township, Butler county; the lessees to hold the premises for the term, and as much longer as oil and gas were produced in paying quantities, Steiner, however, to have the enjoyment of the land for farming purposes, subject to the lease.

In consideration therefor, Marks and McCandless agreed to deliver to Steiner, in tanks or pipe lines, one-eighth of the oil produced; also, to pay him $100 annually for each producing gas well, and furnish him gas for his house free. They further covenanted to commence a well within 60 days, or, in default thereof, pay to Steiner a monthly rental of $7.25; the monthly rental to be deposited to Steiner's credit at his residence, or paid directly to him. A failure to commence the well or pay the monthly rental was to render the lease null and void, only to be renewed by mutual consent. Then, in the last stipulation, it is agreed that the rental shall be paid quarterly in advance.

The defendants had leased other land in the neighborhood and were actively engaged in successfully drilling wells thereon at the time the 60 days were about up within which they were to commence a well on Steiner's land. Not being ready to begin just at that time, Marks went to Steiner's house, the last day, June 12th, to pay in advance the first quarter's rental. When he arrived there, Steiner had gone to bed, but got up, and received the money; at the same time, said to Marks that tomorrow would have done as well, meaning for the payment of the money. The next quarter was paid September 4th, some days before it was due. The next quarter was payable 12th of December; on the 8th or 9th of that month, Steiner was at McCandless' barn. The latter was ready and willing to pay the quarter due on the 12th,

but Steiner evaded the tender by quickly leaving the premises. On the 13th, the day after this quarter was due, Marks called upon Steiner, and tendered him the money, but he declined to receive it, on the ground that it was too late. McCandless testified that a week after, when he urged Steiner to take the money, stating to him that they intended to insist on their rights under the lease, Steiner replied he had a chance to lease at a bigger bonus, and, if they would pay it, he would renew the lease. Thus matters stood until about a month later, when Marks and McCandless went upon the land to put up a drilling rig. Thereupon Steiner brought this action of trespass. Defendants pleaded the general issue, and right of possession under the lease. At the trial, the learned judge of the court below, being of opinion that the neglect of defendants to actually pay or tender the quarterly payment due December 12th on that day worked a forfeiture of the lease, instructed the jury to find for the plaintiff. They accordingly did so, and assessed his damages at $20. From the judgment entered on the verdict, defendants appeal assigning for error the peremptory direction of the court, and averring it was for the jury to determine from the evidence whether Steiner, by his declaration and conduct, had led them to believe strict compliance with the terms as to day of payment would not be enforced.

It is unnecessary to take up the assignments of error in their order, for there is but one point upon which the appeal can be sustained. Should the court have submitted the evidence tending to show a waiver of strict compliance by plaintiff to the jury?

It is true, if reference be had to the written contract, and the tender of payment on the 13th instead of the 12th, Steiner had a legal right to insist on a forfeiture. In this class of agreements, this court has frequently so held, where the intention of the parties, by their written language, is to end whatever estate or right the lessee has in the oil or gas

(the subject of the contract) by default either in operating or making payment; but we have also held that the party claiming to enforce a forfeiture must exercise his right promptly, and it must not be unconscionable. (*Gas Co.* v. *De Witt,* 130 Pa. St. 235, 18 Atl. 724; *Thompson* v. *Christie,* 138 Pa. St. 230, 20 Atl. 934; *Lynch* v. *Gas Co.,* 165 Pa. St. 518, 30 Atl. 984); that is, the rigidness of the rule, as applicable to the written contract, the parties themselves may, by their declarations and conduct subsequent to the writing, mitigate. Bisph. Eq. § 181, states the rule thus:

"If parties who have entered into definite and distinct terms, involving certain legal results or legal forfeiture, afterwards, of their own act, enter upon terms which have the effect of leading one of the parties to suppose strict compliance will not be enforced, the party so doing will not be allowed to do so where it would be inequitable."

In view of this rule, note the evidence of defendants. The first quarterly payment was due the 12th of June. Marks, assuming the right of Steiner to declare a forfeiture if there was default, and that he would probably exercise the right, called upon him at 8 o'clock in the evening, accompanied by a witness, Truver, and roused Steiner from his bed, to make payment. This is his testimony as to what occurred: "I says to him, 'I came up to pay this rental.' And he says, 'What brought you here at this time of night?' I said to him, 'I thought you would kick,' or something of that kind, 'if I didn't come.' And he says, 'You ought to have known me better than that; tomorrow would have done as well;' or something like that." Truver testifies that Steiner said to Marks "that he didn't need to be in a hurry, or something like that, 'for tomorrow would have done as well;' that he ought to have knowed him better than that."

Assuming the jury would have believed these two witnesses, what might have been reasonably implied from the conduct and declarations of Steiner? Marks, by the very fact of

calling with a witness to make payment at an unseasonable hour, disclosed a consciousness of the peril of default, without even confessing it; but in answer, in his own way, to Steiner's question, candidly says so; in effect, says, "I was afraid, if payment were not made this day, you might declare the lease forfeited." What is Steiner's reply? "You ought to have known me better than that; tomorrow would have done as well." What, in view of the circumstances, was the purport of such language, or, rather, what reasonable interpretation might the jury have put upon it? It seems to us they might have found that Steiner meant, and Marks believed, payment of an installment the day after it was due was soon enough, and that he (Marks) ought to have known him better than to think him capable of claiming a forfeiture as the penalty of a few hours' default. On the 13th of December, the day after it was due, that quarterly payment is tendered. He declines it, because it ought to have been made the day before. He had said, "Tomorrow would do as well;" he now says, "Tomorrow is too late." He had said Marks ought to have known him better than to suppose he would reclaim his grant for the default of a few hours; he now, for this slight default, declares a forfeiture.

Nor was Steiner misled by the default into the belief that defendants intended to abandon the lease by a neglect or refusal to pay on the 12th, for McCandless testified that on the 8th or 9th, only three days before the 12th, Steiner called on him at his barn, and this occurred: "I says to him, 'That rental will soon be due, John, and I may as well pay it now.' I knew it would be due in a few days, and I told him it would save us a trip over there; and he says, 'Never mind,' or something like that. But I told him I would just pay him now. I was cleaning the horse at the time, and I put my hand down in my pants pocket, and found I had on my old clothes, and had no money in them. So I said to him to wait a little. 'I will go up to the house, and get the

money.' And I started right up to the house, and he walked right out of the barn, and drove right off. The house is a little distance from the barn, and when I got back, he was gone."

This readiness of McCandless, three days before, to pay the same quarter at the barn, and Steiner's evasion of an opportunity for formal tender, while indicating no unwillingness to receive, is significant of an intention, by the first conversation to lure the defendants into a sense of security, and bring on them the very penalty Marks feared. Was not the natural effect of his language and conduct to lead the defendants, as stated in the equity rule, to suppose strict compliance would not be enforced? If so, then, under the same rule, the party so doing will not be allowed to enforce a forfeiture, because it would be inequitable. The learned judge of the court below was of opinion that, from all that appeared to the contrary in the evidence, the defendants were not influenced by these declarations of Steiner; but that was for the jury. If Steiner had, in effect, said to Marks, "A default of one day is immaterial; I will not declare the lease forfeited for that;" and there was one day's default, and then a tender,—it was for the jury, in view of all the circumstances, to determine whether defendants had been misled by the plaintiff. Clearly, if McCandless was believed, they had no intention of permitting a forfeiture of the lease, for he was ready and attempted to make the payment three days before it was due; and, if he be believed, Steiner well knew they expected to hold the lease, by a substantial observance of its terms.

We think the case was one for the jury, not under the exact instructions as framed in defendants' points, but under instructions indicated in our discussion of the question as to whether the court erred in wholly withdrawing this branch of the case from the jury. It is for them to determine what was said, and what, under the circumstances, was intended

and understood by the parties. If they find, as a fact, the declarations of Steiner were calculated to lead, and did lead, defendants into a day's default, then it would be inequitable in Steiner to enforce a forfeiture, and he cannot recover.

To this extent, only, are the assignments of error sustained.

The judgment is reversed, and a venire facias de novo awarded.

H. P. DOUBLE v. UNION HEAT AND LIGHT CO.

(172 Pennsylvania 388; 33 Atl. 694. Supreme Court. Jan. 6, 1896.)

No surrender during current year. When a tenant having that privilege desires to surrender he must give notice before he enters on the year intended to be surrendered.

[1]**Lessee must notify, to terminate.** An oil and gas lease was to terminate by its own limitation two years from its date; after that the lease was to continue "as much longer as oil and gas is found in paying quantities therein * * * and should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold." *Held*, that after the rental clause became operative by the finding of gas in paying quantities, the lessee could not terminate without giving notice to the lessor of his intention to do so.

The mere cessation of the use of gas from the well did not terminate the lease of its own force and relieve the lessee from any duty to the lessor.

Appeal from Court of Common Pleas, Butler county; John M. Greer, Judge.

Action by H. P. Double against the Union Heat & Light Company for rent under a lease for oil and gas purposes. From a judgment for plaintiff, defendant appeals. Affirmed.

[1]Liable for rent until offer to surrender. *Jamestown Co.* v. *Egbert*, 152 Pa. 53; 25 Atl. 151.

Where lessee has the right to pay rental instead of sinking well, it becomes a lease from year to year. *Lowther Co.* v. *Guffey*, (W. Va.) 43 S. E. 101.

If an oil lessee on a five year term agrees to pay annual rental in default of sinking, the rental is payable annually and may be sued for at the end of each year. *Doxey's Est.* v. *Service*, (Ind. App.) 65 N. E. 757.

Privilege to renew by giving notice; no relief for negligence by failure to give notice. *Dikeman* v. *Sunday Co.* 184 Ill. 546; 56 N. E. 864.

S. F. BOWSER, for appellant.

EVERETT L. RALSTON and JOHN B. GREER, for appellee.

GREEN, J. The definite term of the lease in question ended by its own limitation on May 4, 1893, being two years from its date, May 4, 1891. After that the lease was to continue "as much longer as oil and gas is found in paying quantities therein." No oil was found, but gas was found in paying quantities, and then the rental clause became operative, to wit: "And, should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold." The defendant having purchased the original lease, and taken possession of the premises and well on December 19, 1892, operated the well after that time, and marketed and sold the gas produced until June 1, 1893, when they disconnected the line, ceased to produce gas, and so notified the plaintiff. The defendant offered to pay $88.89 to the plaintiff, being all that they admitted to be due up to the time they ceased to operate the well. This was declined by the plaintiff, who claimed that as the defendant had entered upon the third year of the lease, and had not terminated the lease by any notice to that effect, and had not surrendered or offered to surrender the lease or the possession of the premises, they were liable to pay for another year, or, at least, until the lease was terminated by the act of the defendant, and a surrender of the lease and the premises had taken place. The learned court below instructed the jury in accordance with this view of the case, and as we think, correctly.

In our judgment, the case is controlled by our decison in *Nesbit* v. *Godfrey,* 155 Pa. St. 251, 25 Atl. 621. There the lease was for oil and gas purposes, and was for a definite term of 21 years, "and so long thereafter as oil or gas shall

continue to be found therein in paying quantities." By another clause of the lease, the lessee was empowered to terminate the lease in the following words: "It is hereby agreed that, at any time the said Godfrey and Clark find it will not pay them to continue this lease, they are hereby empowered to declare the same null and void, and to be immediately released from any and all responsibilities herein." The lease was dated on June 12, 1890, and was fixed at a rental of $75 per year, payable in advance. On June 12, 1891, the lessees notified the lessor that they elected to terminate the lease. The plaintiff claimed that the first year had expired when the notice was given, and that the defendants had entered upon the second year, and therefore she was entitled to another full year's rent. The court below gave judgment in her favor, and we sustained the judgment, on the opinion of the court below. The court below said in their opinion: "The question is whether or not on June 12, 1891, the defendants had entered upon their second year under the lease. We think the case is ruled by the cases of *Lysle* v. *Williams,* 15 Serg. & R. 136, and *Marys* v. *Anderson,* 24 Pa. St. 272. There is no substantial difference between the expressions used here and in those cases. The words are used not merely by way of computation, but a present interest is to commence from the date." There is no such narrow question of time in this case, and the decision is cited for the proposition that, if a tenant wishes to avail himself of a privilege which he possesses of terminating the lease by his own act, he must do it before he has entered upon another year of his term. In this case, the tenant, having the right to terminate the lease by a notice to that effect, gave no such notice until several months had elapsed after the production of gas was stopped, and nearly a year had elapsed after they took possession and began to operate the well. The appellant's contention that the mere cessation of the use of the gas from the well terminated

the lease of its own force, and relieved the defendant from any further duty to the plaintiff is entirely untenable. If the defendant desired to be relieved from any obligation of the lease, and the contingency had arrived when they could claim the benefit of such release, it was their plain duty to notify the plaintiff that the well had ceased producing gas in paying quantities, and that, therefore, they terminated the lease and surrendered it. Not having done so, the lessor would have no knowledge of their intention. He could not re-enter upon the premises, to determine the truth of their assertion as to the cessation of the gas, or to relet it to another tenant. He was certainly entitled to notice of the termination of the contract relation, so that he might resume his rights and protect his interests. Instead of that, the lessee continued in possession, never surrendered the lease, or offered to do so, and remained in full possession up to the time of the trial. The assignments of error are not sustained.

Judgment affirmed.

THE FRANKLIN MINING CO. v. FRANK X. O'BRIEN.

(22 Colorado 129; 43 Pac. 1016. Supreme Court. January 27, 1896.)

[1]**Purchase by co-tenant of overlapping location—Purchase of outstanding title.** A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the common benefit of all the co-tenants, and this rule applies to the purchase by a tenant in common in a mining claim of an interest in a senior conflicting location.

Knowledge of promoters. As a general rule a corporation is not affected with notice or knowledge of facts merely because some of its promoters had knowledge of such facts, or because some of its stockholders had notice thereof.

Knowledge personal to incorporators—Knowledge personal to officers. A corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself and not for the company.

[2]**Shifting title to corporation.** An equitable title is not defeated by the fact that the holders of the legal title convey to a corporation of which they were the promoters and organizers and are its directors and only stockholders. In such case the company stands charged with the same equities as existed against its grantors and with the knowledge thereof which they possessed.

Appeal from the District Court of Arapahoe county.

MESSRS. WOLCOTT & VAILE and MESSRS. THOMAS, BRYANT & LEE, for appellant.

[1]*Turner* v. *Sawyer*, 17 M. R. 683. *Hallack* v. *Traber*, 18 M. R. 360.

One fraudulently neglecting to do the annual labor cannot relocate and oust co-tenant. *Royston* v. *Miller*, 76 Fed. 50; 18 M. R. 418.

Lessees relocating forfeit all rights under the lease. *Silver City Co.* v. *Lowry*, 19 Utah 334; 57 Pac. 11.

A tenant in common cannot relocate as against his co-tenants. *Speed* v. *McCarthy*, 181 U. S. 269.

If a co-tenant buys an adjoining claim to get an apex he holds in trust for all co-tenants. *Cedar Co.* v. *Yarwood*, 27 Wash. 271; 67 Pac. 749.

His grantee knowing the facts takes subject to the equity. *Id.*

[2]*Murray Hill Co.* v. *Havenor*, 24 Utah 73; 66 Pac. 762.

MESSRS. RIDDELL, STARKWEATHER & DIXON and MR. CLINTON REED, for appellee.

MR. JUSTICE CAMPBELL delivered the opinion of the court.

The appellee O'Brien, who was plaintiff below, is the owner of an undivided one-fifth of the Franklin mining claim; the appellant, The Franklin Mining Company, the defendant below, is the owner of the remaining undivided four-fifths thereof, the sole owner of the Dr. Franklin mining claim, and the owner of an undivided one-half of the Steele mining claim, all situate in the Aspen mining district, Colorado.

The complaint in this case contains two causes of action, but as plaintiff bases his rights upon the second and upon his replication, the first cause of action, which is in the ordinary form for the recovery of the possession of real property, will not be further noticed.

The second cause of action in substance alleges that the plaintiff is the owner of an undivided one-fifth of the Franklin lode and the defendant is the owner of the other four-fifths therein, and they, as tenants in common, are the owners, and in the actual possession, of said claim; and that whilst they were so in possession and working and developing the mine, the defendant, on the first day of April, 1887, disregarding the plaintiff's rights, ousted him from possession of the premises in controversy and wrongfully assumed and exercised the sole and exclusive ownership thereof; that from the territory in question the defendant has extracted and converted to its own use valuable ores, and has refused to account to the plaintiff for his share thereof.

A decree is sought, adjudging the plaintiff to be the owner of the undivided one-fifth of the mining claim; an accounting is asked for, as well as a temporary injunction restraining the working of the mine, and general relief is prayed.

To this complaint an answer was filed containing eight separate and distinct defenses, the affirmative ones of which were substantially denied by the replication. The pleadings are very voluminous,—unnecessarily so,—and tend rather to obscure than to elucidate the real controversy in the case. No attempt will be made even to summarize all of these separate defenses; and while it is, among other things, contended that in the replication there is a material departure from the complaint, we are satisfied that the pleadings, as well as the evidence, fairly present for determination the legal propositions necessary for the appellee to maintain in order to justify the judgment below.

It will, however, tend to explain this controversy to state generally that the defenses set up in the answer, so far as we deem them material, are, *first*, that the defendant is, in law and in fact, the owner, and entitled to the exclusive possession, of that portion of the territory which is in conflict between these three claims, by virtue of its ownership of the Dr. Franklin lode and of an undivided one-half interest in the Steele lode, each of which we shall assume, what we consider to be admitted, to be a senior and prior location to the Franklin; *second,* and as strengthening and fortifying this superior right, that in a certain adverse suit duly pending in the district court of Pitkin county between the then owners of the Franklin and the Dr. Franklin claims, a judgment was duly rendered establishing the priority of the Dr. Franklin over the Franklin claim, and that the defendant having bought into the latter after this suit was instituted, took subject to the determination of that action.

Assuming the priority, as locations, of these two claims over the Franklin lode, the replication is that the plaintiff and defendant's grantors were tenants in common, and in actual possession, of the Franklin lode, and that arising therefrom the relations of trust were such that said grantors could not buy in and set up as against their cotenant a superior,

outstanding and adverse title; that the judgment making the Dr. Franklin superior to the Franklin was rendered by consent, and for the benefit, of all the several owners of the latter; and that the defendant company, in law, is charged with full notice of the equities belonging to plaintiff. Other issues, if any, raised by the pleadings, we do not consider important.

Upon trial to the court without a jury the finding was that the allegations of the second cause of action and the matters set forth in plaintiff's replication were established, and a decree was thereupon entered, adjudging plaintiff to be the owner of an undivided one-fifth interest of the territory in conflict between the Franklin and the Dr. Franklin lodes, and an undivided one-tenth interest in the territory in conflict between the Steele and the Franklin lodes. From that decree the defendant is prosecuting its appeal to this court.

The evidence tended to show, and is sufficient to uphold, the finding of the trial court that the plaintiff and the grantors of the defendant were tenants in common, and, as such, in actual possession of the Franklin lode, though they did not hold under the same instrument, or from the same grantor. The only unity in their ownership was that of possession. Whilst so in possession, plaintiff's cotenants bought all of the Dr. Franklin and one-half of the Steele mining claims, and would not, upon his offer so to do, permit their cotenant to contribute his portion of the purchase money, but instead refused to allow him so to do, and they now claim the exclusive ownership of the territory in conflict between these claims.

It is probably true as to some of the fractional interests, if the time when these superior rights were acquired is to be determined from the dates of the deeds of conveyance, that they were purchased by plaintiff's cotenants before they acquired their interest in the junior Franklin lode; but as the record shows that such interests were conveyed in accord-

ance with a parol agreement made prior to that time, and which was after the cotenancy in the Franklin existed, it is only just and fair that the date of the acquisition of such superior interest is to be determined by reference to the time when the original agreement was made, and not when the conveyances were actually executed.

Hence, it follows that as the interests were acquired, or contracted for, while the relation of cotenancy in the Franklin lode existed, the purchasers should in equity be considered as tenants in common with the plaintiff.

This brief statement of the pleadings and the evidence will sufficiently indicate, generally, the nature of this cause; but to make clear all the different questions involved, greater particularity in the statement will be observed in the appropriate place in the opinion.

To obtain a reversal of this judgment and decree the appellant relies upon the following general propositions: *First*, that the appellee O'Brien is not and never was a cotenant with the appellant, nor with any of appellant's grantors, of the land in controversy; *second*, that if the Franklin claim, as such, should be held to include the ground in controversy, nevertheless the purchase by appellant's grantors of the superior and paramount title of the Steele and the Dr. Franklin did not inure to the benefit of the appellee so as to give the latter an interest with the appellant in the lands held under such superior and paramount title; *third*, if the principle invoked by the appellee is applicable in any way to the facts of this case, his right would, in any event, be limited to a share in the individual purchases of the senior titles made by D. R. C. Brown; *fourth*, that the defendant company, formed after these various transactions occurred, took, relieved of all equities that may have existed as between its grantors and plaintiff; *fifth*, that the plaintiff has failed to establish the existence of any such mining claim known as the "Franklin lode."

These general propositions, together with such subordinate matters as naturally arise in connection therewith, and the facts which the evidence and pleadings disclose, will be treated in the order followed by counsel in their able and exhaustive arguments, which have materially assisted us in our examination of the complicated case presented in the record.

The general rule, as stated by Mr. Freeman, is:

"A cotenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the cotenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money." Freeman on Cotenancy & Partition, sec. 154.

In support of the first proposition the argument is that each of these three mining claims is a separate and distinct thing in law; that the first of the three embraced every part of the ground within its exterior boundaries, the second only that portion within its exterior boundaries not in conflict with the first, and the third only that territory within its exterior boundaries not in conflict with either the first or second. So that when the appellee or appellant, or any of its grantors, bought an interest in the Franklin lode, it being the third in order of priority, neither purchaser got any interest in any ground in conflict, but only what was outside of the boundaries of the two senior locations; and that when the appellant, or its grantors, whilst they were cotenants with the appellee of this nonconflicting ground, bought an interest in either of the senior conflicting locations which, in law, absorbed the conflicting territory, there was not thus acquired an outstanding title or interest in the land in con-

troversy in this case, by a tenant in common in the Franklin lode, nor was there a purchase of any outstanding or adverse title relating to it, but a purchase merely of a title to an entirely distinct and independent entity. To put it in another form, it is contended that the owners of the Franklin are tenants in common only as to the nonconflicting territory, but not as to the ground in controversy.

If this contention be true, or the distinction logical, the entire case of the plaintiff falls, for he must recover, if at all, only upon the theory of a trust relation between the defendant's grantors and himself as tenants in common of the disputed ground, and because of their having done something to his prejudice in reference to the common property.

But this reasoning, while specious, and, in one view of the case, sound, is not applicable to the rights of the parties in this case. The rule that the appellee invokes, as was said by Mr. Justice Miller in the case of *Rothwell* v. *Dewees,* 2 Black (U. S.), 613, is "based on a community of interest in a common title, which created such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated."

Unquestionably, plaintiff and defendant's grantors were tenants in common of all the ground properly included in the Franklin location. It is true, also, that each one of these mining claims is, in law, a different thing from either of the others. Buying a title, therefore, in one of the senior claims, is not literally buying in an outstanding title of the Franklin claim; but to permit a tenant in common of the Franklin claim to buy in the title of a senior conflicting mining location, and assert it against his cotenant in the junior claim, would certainly prejudice his cotenant; for, if this could be done, the title of the latter as to the conflicting ground would thus be as effectually extinguished as if the patent to the junior location itself were obtained, with hostile

intent, by the tenant and successfully asserted against the cotenant.

The reason for the application of the rule in the one case is as forcible as in the other, and to draw any such distinction as is here claimed with respect to cotenancy in mining claims would be to sacrifice substance for shadow, and enable gross wrongs to be perpetrated, contrary to the principle which gives life to the rule.

But it is further urged, and in support of the second proposition, that the general rule, in any event, is confined to joint tenants, tenants by entireties and coparceners strictly; and to tenants in common only when they take from the same grantor and by the same instrument, or by operation of law, or when the duty is the result of an express contract between them to that effect. The expression of this exception is found in section 155 of Freeman, and is as follows:

"As the rule forbidding the acquisition of adverse titles by a cotenant, from being asserted against his companions, is always said to be based upon considerations of mutual trust and confidence supposed to be existing between the parties, the question naturally arises whether the rule is applicable where the reasons on which it is based are absent. Joint-tenants, tenants by entirety, and coparceners always hold by and under the same title. * * * Tenants in common, on the other hand, may claim under separate conveyances, and through different grantors. Their only unity is that of right to the possession of the common subject of ownership. As their connection is not necessarily so intimate as that of other cotenants, it may well be doubted whether they should always be subject to the restraints imposed upon the others. There are many cases in which the rule in regard to the acquisition of an adverse title by a cotenant is spoken of in general terms as applying to tenants in common, irrespective of their special and actual relations to one another. But an examination of the decisions clearly shows that tenants in

common are not necessarily prohibited from asserting an adverse title. If their interests accrue at different times, and under different instruments, and neither has superior means of information respecting the state of the title, then either, unless he employs his cotenancy to secure an advantage, may acquire and assert a superior outstanding title, especially where the cotenants are not in joint possession of the premises."

All the authorities upon this question are based upon the case of *Keech* v. *Sandford,* reported in volume 1 of White & Tudor's Leading Cases in Equity, at page 48, while the leading case in this country is *Van Horne* v. *Fonda,* 5 Johns. Ch. Rep. 388. Undoubtedly this exception to, or limitation upon, the general rule has been recognized, if the doctrine itself has not been expressly adjudicated, in the following among other cases: *Matthews* v. *Bliss,* 22 Pick. 48; the notes to *Keech* v. *Sandford, supra; Roberts* v. *Thorn,* 25 Tex. 728; *Rippetoe* v. *Dwyer,* 49 Tex. 498; *King* v. *Rowan,* 10 Heisk. (Tenn.) 675; *Frentz* v. *Klotsch,* 28 Wis. 312; *Myers* v. *Reed,* 17 Fed. Rep. 401; *Turner* v. *Sawyer,* 150 U. S. 578; *Stevens et al.* v. *Reynolds,* 41 N. E. Rep. (Ind.) No. 22, 931. Also Mr. Freeman's work on Cotenancy and Partition, *supra.*

On the contrary are the following, some expressly repudiating the exception, others tacitly recognizing that no such distinction in cotenancies exists: *Rothwell* v. *Dewees, supra; Smiley* v. *Dixon,* 1 P. & W. (Pa.) 441; *Bracken* v. *Cooper,* 80 Ill. 221; *Montague* v. *Salb,* 106 Ill. 49; *Venable* v. *Beauchamp,* 3 Dana, 321; *Brown* v. *Homan,* 1 Neb. 448; *Jones* v. *Stanton,* 11 Mo. 433; *Picot* v. *Page,* 26 Mo. 398; *Titsworth* v. *Stout,* 49 Ill. 78; *Keller* v. *Auble,* 58 Pa. St. 410; *Boskowitz* v. *Davis,* 12 Nev. 446; Tiedeman on Real Property, sec. 252.

See, also, notes to *Venable* v. *Beauchamp,* 28 Am. Dec. 74, which were prepared by Mr. Freeman, the author of the work on Cotenancy and Partition, in which he seems to ques-

tion the correctness of the doctrine stated by him in section 155 of the first volume of his treatise. The list might be extended much further, but the doctrine will be found fully discussed in the foregoing citations.

There are, we think, cases where the rule will not apply to tenants in common, but we need not attempt to specify what those cases are, for the case at bar falls within this exception, which is apparent upon a consideration of the evidence pertinent to the amended fifth defense of the answer. To give in detail the facts and circumstances disclosed by the evidence under this defense would serve no useful purpose; and we content ourselves with merely a statement of the conclusions therefrom reached by us after a careful examination, and these conclusions pertain both to the second and third propositions.

Before and during the month of August, 1886, D. R. C. Brown, for himself and Mr. Cowenhoven, and Eben Smith, for himself and others connected with him, owned, at Aspen, in the vicinity of this ground in conflict, certain mining claims. Brown then owned, also, as we have seen, five-sixths of the Franklin, one-half of the Steele and one-sixth of the Dr. Franklin claims. An adverse suit was then pending between the owners of the Franklin and the Dr. Franklin claims, which was being pressed for trial by the latter. The attorneys of the Franklin advised their clients to settle the suit, and on August 2d, toward that end, an agreement for the purchase, at a consideration of nine thousand dollars, of the five-sixths interest of the Dr. Franklin held antagonistically to the Franklin, was made by Brown and Smith, and on August 3d the deed of conveyance therefor was taken by T. G. Lyster as trustee for Brown, Smith and their associates. Thereupon, by consent, a judgment was rendered in the suit establishing the priority of the Dr. Franklin location.

Before this agreement of purchase was made, some sort of an arrangement was entered into between Brown and

Smith, representing respectively themselves and their associates, whereby the aforesaid properties owned by Brown and Smith, together with the interests which Brown then owned in the three claims involved here, were to be consolidated and worked as one property, the title to which was to be taken ultimately in the name of a corporation thereafter to be organized, whose capital stock was to be entirely owned by this syndicate, in such proportion or shares as their agreement called for.

In pursuance of this object, and as a part of the scheme,—it being supposed that all antagonisms between the Franklin and the Dr. Franklin would be allayed thereby,—this purchase was made, the conveyance above mentioned executed, and this judgment entered, and subsequently, and in furtherance of this design, a conveyance from Lyster, as trustee, was made to Moffat, as trustee, who, in turn, on February 28, 1887, conveyed to the defendant company—the two latter transfers being evidenced by one instrument—one-half of the Steele, five-sixths of the Franklin, and all of the Dr. Franklin claims.

There is no question that such, in brief, was the general scope of this plan, and though every detail was not worked out at the time when the Dr. Franklin was purchased, yet before the conveyance to the defendant company was made the agreement in all its details was perfected, and the general scheme thus accomplished.

When this judgment was entered, neither Brown nor O'Brien was a party to the adverse suit, but the two together then owned the whole of the Franklin claim. O'Brien was absent from the state and not represented by counsel when the settlement was perfected and the judgment rendered. Before this, however, in a conversation with Smith, he was given to understand that during his absence from the state his interests in this suit would be attended to by Smith, if the occasion required, as Smith was then, as he said, about

to negotiate for an interest in this same property, which, it appears, as already stated, he afterwards secured.

The relation of cotenancy between Brown and O'Brien was then unquestionably in existence as to the Franklin claim, and they were in such possession thereof as the nature of the property admitted. In equity, this relation extended to Smith and his associates, for, by the scheme of consolidation, Brown and Smith were, in equity, cotenants of the same property of which O'Brien was part owner, and so the act of Brown affecting this Franklin claim under the scheme of consolidation equally affects all his associates, for the same trust relation attaches to all for whom Brown was then acting. The fact that Lyster, as trustee, took title to the Dr. Franklin one day before he took the title to one-half of the Steele and four-fifths of the Franklin, and that Moffat, as trustee, and the defendant company, as the legal owner, took title to all these three properties in one and the same deed, cannot be successfully urged here to defeat the application of this equitable rule; for, aside from the fact that the time when the parol agreement for the purchase, and not the date of the instruments of conveyance, must govern, the order of priority of the different steps by which these properties were acquired, and this scheme of consolidation thereby perfected, is immaterial, so long as the very parties whose trust relations called for the exercise of good faith toward O'Brien were the active and prime movers in all these transactions. *Venable* v. *Beauchamp, supra.*

If the facts do not bring this case literally within the application of the general rule, the conduct of the parties in connection with the adverse suit, together with this trust relation, brings the case within the exception, and certainly estops them from asserting this superior title against O'Brien. We are of opinion that when these superior titles were bought, the purchasers themselves supposed that O'Brien had an interest therein, and that they intended him to have the

benefit thereof in such proportion as his ownership in the Franklin equitably entitled him, and their subsequent acts and conduct corroborate this conclusion. It was only when the property became valuable and was a producing mine that the attempt to exclude O'Brien was made. The securing of the Dr. Franklin claim by Smith and Brown was the result, in part, at least, of Brown's coownership with O'Brien of the Franklin, which enabled him to use the pendency of the adverse suit against his adversary as an aid in securing the superior title. To permit Brown, while the relation of cotenancy existed, and while he and his cotenant were in possession, so to use this relation as to get for himself that which he might employ to his cotenant's injury, cannot be tolerated by a court of equity. *Lee* v. *Fox*, 6 Dana, 171 and 180.

Our conclusion is that Smith and Brown, in acquiring title to the Dr. Franklin claim, employed the relation of cotenancy in securing the same. As to the Steele title, Brown acquired this when he was unquestionably a tenant in common with appellee, and, for the reasons above given, he should be held as a trustee as to the same, for O'Brien's benefit in such proportion as the latter's interests in the Franklin entitle him. *Duff* v. *Wilson*, 72 Pa. St. 442; *Dickey's Appeal*, 73 Pa. St. 218; *Flagg* v. *Mann*, 2 Sumn. 520.

We have thus far considered the case as though it were between the original parties to these transactions; but the defendant insists that its rights and liabilities are different from those of its grantors. The general rule undoubtedly is that a corporation is not affected with notice or knowledge of facts merely because some of its promoters who organized the corporation had knowledge of such facts, or merely because some of its stockholders had notice; and a corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself, and not for the corporation. To this effect we are referred

to the case of *Davis Wagon Wheel Co.* v. *Davis Iron Wagon Co.*, 20 Fed. Rep. 699. Many other cases holding the same doctrine might be cited.

Upon this principle the defendant contends that even if its grantors knew of plaintiff's equities, the conveyance by them to it of this superior title vested the same in the defendant discharged of all previously existing equities.

This principle might be applicable here were it not for certain facts which, we understand, are virtually uncontroverted. The grantors of defendant, representing themselves and their associates, who were its promoters and organizers, and who now constitute its directors and are its only stockholders, we have held to be charged with plaintiff's equities. The ownership of this conflicting territory is now in precisely the same persons that it was before the corporation acquired title, and that ownership is now represented by certificates of stock, whereas formerly it was evidenced by deeds of conveyance. In conveying to this defendant it is true that these promoters dealt in their own interests, but they conveyed to a corporation whose entire capital stock they also owned. The consideration for the transfer passed from the same parties in their capacity as shareholders of the corporation to themselves as individuals. The grantors acted not solely for themselves as individuals, but also for the corporation whose capital stock they owned, and the transaction should be regarded as one in which the same parties are grantors and grantees. We are of the opinion, therefore, that the same equities exist against this defendant as against its stockholders who were its grantors.

The point made that the plaintiff should not recover because no proof was made of the validity of the Franklin lode, we do not think tenable. By all the parties to this suit before its institution, the Franklin was treated as a valid claim, and throughout the trial the same assumption was

indulged. The evidence may not be very direct as to this, but, in any event, the appellant is not authorized to urge this objection under any of the assignments of error.

Upon the whole case our conclusion is that the findings and decree of the district court are right, and, accordingly, the decree is affirmed.

Affirmed.

J. B. GIRARD ET AL. v. J. C. CARSON ET AL.

(22 Colorado 345; 44 Pac. 508. Supreme Court. March 16, 1896.)

[1]**Where the discovery shaft on a senior claim is patented as parcel of another claim the claim on which it was sunk becomes void and all its pretensions to seniority are gone by its failure to adverse.**

Where a third party holds a patent covering discovery shaft of a party to the suit, title in such party for that purpose and to that extent may be shown, notwithstanding the rule that in suits supporting adverse claims each party must stand on the strength of his own title.

Appeal from the Court of Appeals.

The decision of the court below in this case is reported under the title of *Miller* v. *Girard,* 3 Colo. App. 278.

W. W. COOLEY and AARON HEIMS, for appellants.

C. W. FRANKLIN and PORTER PLUMB, for appellees.

CHIEF JUSTICE HAYT delivered the opinion of the court.

This is an adverse suit, instituted by J. B. Girard and others, as the owners of the Long John mining claim, situate

[1]*Strepey* v. *Stark,* 17 M. R. 28.

Gwillim v. *Donnellan,* 15 M. R. 482, cited in the text is the leading case on the effect of loss of discovery shaft. But in *Richard* v. *Wolfling,* 98 Cal. 195; 32 Pac. 971, where an agricultural patent was issued covering that end of a lode claim on which all or nearly all the work had been done and where the clear end of the lode could be reached only by work started on the patented end, the court distinguished the case and held *Gwillim* v. *Donnellan* did not apply.

A valid discovery shaft cannot be sunk within the lines of a valid subsisting location. *Armstrong* v. *Lower,* 15 M. R. 631. *Golden Terra Co.* v. *Mahler,* 4 M. R. 390.

in Pitkin county, Colorado. J. C. Carson and others were made defendants. The defendants claim the ground in controversy as a part of the Aurora and Elgin mining claims.

Plaintiffs in the complaint allege that the Long John mining claim was located upon the unappropriated public domain of the United States on the 25th day of June, 1883. The defendants' claims were not located until five years thereafter, to wit, in 1888.

Another mining claim that has an important bearing upon the controversy is owned by third parties, and is known as the "North Star." In 1889 the owners of this mining claim applied for a patent, and prior to the institution of this suit obtained a receiver's receipt for all the territory embraced within the North Star location. The defendants having introduced proof tending to show that the original discovery shaft of the Long John claim was located within the exterior boundaries of the North Star claim as patented, they asked the court to give the following instruction with reference thereto:

"The jury are instructed that if you believe from the evidence that the original discovery shaft of the Long John lode was sunk on unappropriated ground and that afterwards the plaintiffs permitted it to be taken away from them and patented as a part of the North Star lode mining claim, the plaintiffs cannot recover in this suit unless they made another location on unappropriated ground by setting up a new discovery stake at the new discovery shaft and otherwise complied with the requirements of the law as indicated in instruction 1, with regard to the location of a mining claim."

This instruction correctly states the law applicable to the evidence and should have been given. In order that the locator of a mining claim may obtain any right to mining property by virtue of his location, the same must be made upon the unappropriated lands of the United States, and where application is made for a patent to another, which

includes within its exterior limits the original discovery shaft of a prior location, it is necessary for the owners of such prior location to institute adverse proceedings within the time provided by law, if they desire to hold any portion of the property by reason of their original location.

Where such adversary proceedings are commenced and determined adversely to the claimant, he thereby loses all right, not only to the territory actually in conflict, but all right *based upon such location,* and a party failing to institute adverse proceedings within the time prescribed by statute stands in the same and no better position than one who has instituted such proceedings and suffered defeat. It matters not that the party in fact has the senior location. Upon failing to institute adverse proceedings, it will be conclusively presumed that his rights are inferior and subject to the party obtaining a patent.

As the statute only permits mineral locations to be made upon the unappropriated public domain of the United States, it is necessary for the claimant, in order to show a valid location, to establish that such location was in fact made upon vacant and unappropriated territory; so likewise, the defendant, for the purpose of showing that plaintiffs' claim was not located upon lands subject to location, may prove a better right in a third party for the purpose of defeating plaintiffs' location.

This is not in conflict with the rule which requires each party in an adverse proceeding to rely upon the strength of his own title, rather than upon the weakness of his adversary's, for the reason that, in order to establish any title under the mining laws, each party must show a location upon unappropriated territory. This is now so well settled that it is unnecessary to do more than state the conclusion. *Armstrong* v. *Lower,* 6 Colo. 393; *Gwillim* v. *Donnellan,* 115 U. S. 45.

The instruction prayed for by the defendant correctly stated the law applicable to the proofs in this case. It was not contained in substance or in effect in the charge given by the court to the jury, and the judgment of the court of appeals, reversing the judgment of the district court, must be affirmed.

Affirmed.

ISAAC E. BLAKLEY ET AL. v. THOMAS M. MARSHALL, TRUSTEE.

(174 Pennsylvania 425; 34 Atl. 564. Supreme Court. March 23, 1896.)

[1]Oil lease akin to sale of land. An oil lease, investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain percentum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises.

[2]Rights of life tenants. If the lessors in an oil lease are life tenants and remainder-men the life tenants are entitled to the interest on the royalties during life, and at their death, the corpus of the fund made up of the aggregate royalties goes to the remainder-men.

Appeal from Court of Common Pleas, Butler county; John M. Greer, Judge.

Action by Isaac E. Blakley and wife against Thomas M. Marshall, trustee. Judgment for defendant. Plaintiffs appeal. Affirmed.

SPONSLER & MCQUAIDE and KENNEDY MARSHALL, for appellants.

J. D. MARSHALL, for appellee.

STERRETT, C. J. No question is raised in this case stated as to the validity of the lease under which the oil in question was produced, nor is there any question as to the title of the lessors to the leased premises. By their informal deed of November, 1890, Andrew Blakley and wife granted

[1]In *Denniston* v. *Haddock*, 200 Pa. 426; 50 Atl. 197, the court criticises, if they do not overrule, all the cases making the distinction expressed in the text case in this language, "the expression that a conveyance of coal in place even by a lease for a limited term is a sale, is inaccurate as a general proposition of law and unfortunate from its tendency to mislead. . . ."

[2]Tenant for life has the right to royalties from open mines. *Koen* v. *Bartlett*, 18 M. R. 289.

and conveyed to Isaac E. Blakley and Louisa Blakley, the plaintiffs, a life estate in the land, with remainder in fee to their children, and appointed said life tenants trustees for their said children. Habendum: "To them, the said Isaac Blakley and Louisa, his wife, for and during their life, and no longer, and as trustees and in trust for their said children, their heirs and assigns, forever, subject to the life estate of said Isaac E. Blakley and Louisa, his wife; and, in case of the death of Isaac E. Blakley, Louisa Blakley, his wife, * * * shall only be trustee, and have control of the above mentioned property so long as she remains his widow."

Acting for themselves in their own right as tenants for life, and also as trustees for those in remainder, the plaintiffs executed the lease to N. B. Duncan "for the purpose of operating and drilling for petroleum and gas," for the term of 15 years from August 10, 1894, "and so long thereafter as oil and gas can be produced in paying quantities." It was obviously necessary, as well as to the interest of both the tenants for life and the remainder-men, that they should thus unite in the lease, because no practical oil operator would undertake the development of supposed oil territory on the faith of a lease from life tenants only; and for the further and more important reason that, if not promptly developed and worked, the land would soon have been drained of its oil through wells on adjoining lands.

The leased premises proved to be productive, and the oil in question represents the lessors' royalty under the lease. As life tenants of the premises, plaintiffs claimed the oil as their individual property, free and discharged from any trust or confidence whatsoever. The defendant is a trustee, appointed by the court below, to receive the lessors' share of the oil produced under the lease, invest the proceeds, and pay the interest annually realized therefrom to the plaintiffs during their joint lives and the life of the survivor, and, at the death of the latter, to pay the principal to the remainder-men entitled thereto.

In support of plaintiffs' claim to the whole of the royalty, etc., much stress was laid on the doctrine of waste; but we fail to see that it has any application whatever to the facts of this case. It is conceded that the oil was produced under the lease made by plaintiffs, in their own right as life tenants, and as trustees for those in remainder; and, as appears by the opinion of the court, their action as trustees for the remainder-men was with its sanction and approval. It is difficult to see on what principle the cestui que trust should be excluded from participation in the royalty that accrued during the existence of the life estate. Assuming, for sake of illustration, that they had been of full age, and sui juris, and, instead of being parties, through their trustees, to an oil lease, they and the tenants for life had united in a conveyance in fee of part of the land, could it, in the absence of any agreement on the subject, be successfully claimed that the life tenants were entitled to the purchase money? We think not. There is no difference, in principle, between the two cases. As was held in *Appeal of Stoughton,* 88 Pa. St. 201, and other cases in same line, oil in place is a mineral, and, being a mineral, it is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain percentum thereof, is, in legal effect, a sale of a portion of the land, and the proceeds represents the respective interests of the lessors in the premises. If they be life tenants and remainder-men, the former are entitled to the enjoyment of the fund (i. e. interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remainder-men. This is as nearly a just and equitable distribution as can be made. It is in accord with the conclusion reached by the learned president of the court below, and there appears to be no reason why the judgment should be either reversed or modified. We are all of opinion that it should be affirmed.

Judgment affirmed.

HARRIET TREVASKIS v. THOMAS PEARD ET AL.

(111 California 599; 44 Pac. 246. Supreme Court. March 26, 1896.)

[1]Annual labor after owner ousted. The owner of a placer mineral claim does not forfeit his right thereto so as to render it subject to relocation by failure to perform the required annual assessment work during the time when adverse possession is held by another, where he commences action for its recovery within the statutory time.

[2]Proof without plea. Proof of the abandonment of a mining claim by a defendant may be given by plaintiff, in ejectment therefor, without a special plea, where the defendant pleads, and relies on as a defense to the action, a location prior to that of plaintiff.

Taking advantage of intruders' development. Where the owner of a mining claim, which was erroneously included in a sale under a decree of court, moved his effects from the claim, and absented himself two years, allowing the purchasers to work it without objection, while knowing that their title was invalid and intending to claim it only in case their development rendered it profitable to do so, his acts will constitute an abandonment.

[3]The want of intent to abandon will not avail against conduct from which abandonment is a necessary conclusion.

Conditional abandonment. No such thing can be recognized as an intent to return under certain conditions.

---

[1]*Mil's* v. *Fletcher*, 17 M. R. 671. *Lockhart* v. *Wills*, 9 N. Mex. 263; 50 Pac. 318; 9 N. Mex. 344; 19 M. R.—. This case as reported in 9 N. Mex. 263, holds as above. The later report, 19 M. R.— reverses the first opinion and states facts which were held not to excuse.

[2]See *Bishop* v. *Baisley*, 28 Ore. 119; 41 Pac. 936. *Hector Co.* v. *Valley Co.* 28 Colo. 315; 64 Pac. 205. *Contreras* v. *Merck*, 131 Cal. 211; 63 Pac. 336.

[3]*Harkrader* v. *Carroll*, 18 M. R. 474. *Stage* v. *Boyer*, 183 Pa. 560; 38 Atl. 1035.

A forfeiture takes place when a man neglects to work, without regard to intention. *McKay* v. *McDougall*, 25 Mont. 258; 64 Pac. 669.

In abandonment case a party may testify as to what was his personal intention. *Bartley* v. *Phillips*, 179 Pa. 175; 18 M. R. 145.

Abandonment is a question of intention to be found as a fact by the jury. *Marshall* v. *Harney Peak Co.* 1 S. Dak. 350; 47 N. W. 290. *Aye* v. *Philadelphia Co.* 193 Pa. 451; 20 M. R.—.

It may be inferred from facts inconsistent with intention to return. *North A. Co.* v. *Adams*, 104 Fed. 404.

Appeal from a judgment of the Superior Court of Nevada county; John Caldwell, Judge.

ALFRED D. MASON and F. J. DENNIS, for appellant.

CHAS. W. KITTS, for respondents.

HENSHAW, J. Appeals from the judgment and from the order denying a new trial.

The action was brought under section 738, Code Civ. Proc. to settle conflicting claims to the land in controversy, being certain placer mining claims. Thomas Peard is the only defendant interested in this hearing, but as he appears merely as respondent, and has himself prosecuted no appeal, his attack upon certain findings and conclusions of law which he claims are unsupported or unsound cannot be considered. The objections which may be reviewed are those alone which appellant urges.

In 1887 the lands in question were public mineral lands of the United States. Upon that date they were located by Peard, and others to whose rights Peard afterwards succeeded. In this location was included about 17 acres to the north of and adjacent to the land in controversy. The land in controversy lies in section 2; the 17 acres, in section 35. One hundred dollars worth of labor was yearly expended upon the premises by Peard until the year 1891. In 1889, however, an action was prosecuted against him to foreclose a miner's lien upon his claim. The complaint sought to subject to the lien, not the land here in controversy, but the 17 acres, above referred to. Peard made default in this action, and the judgment declared a lien upon the land in controversy as well as upon the 17 acres, and decreed a sale in satisfaction of the same. All the land was accordingly sold in compliance with the decree and order of sale which conformed thereto; but, after the sale, the court amended its judgment and the order

of sale by striking therefrom the portion of the land here in controversy, and limiting the lien to the 17 acres described in the complaint. The sheriff's deed, executed after these amendments, purported to convey all of the land, that here in controversy as well as the 17 acres to the purchaser, Simmons. Thereafter Simmons conveyed all of his interest to Henry Trevaskis (husband of this plaintiff) and to Ida Marion. Trevaskis and Marion continued to hold and work the claim. In December 1893, this defendant Peard commenced an action in ejectment against Henry Trevaskis and Ida Marion to recover the premises here in dispute. Harriet Trevaskis was not made a party to that action. Judgment therein passed for Peard. Thereupon Trevaskis and Marion abandoned their claim upon it, and Harriet Trevaskis and her married daughter, Ella Raymond, entered upon it and located it as vacant mineral land. Ella Raymond thereafter sold to her mother her interest in the location for an expressed consideration of one dollar, and in due time this action was commenced.

In her complaint, plaintiff alleged the location by Peard in 1887, but averred that Peard had not performed the annual amount of work required by law for the years 1891 to 1894 inclusive; that, therefore, the claim become "jumpable," and "Peard's interest was forfeited;" and that she had under these circumstances, made a valid location.

Peard answered, denying that plaintiff had any interest in the land, pleaded his action against Henry Trevaskis as a bar, and set up a valid claim under the first location. He averred that the attempted location of Harriet Trevaskis and Ella Raymond was fraudulent and void, and that the land, at the time thereof, was not subject to location.

The court, by its findings and conclusions, determined that the rights which plaintiff and her colocator acquired were separate property; that Ella Raymond had "loaned the use of her name to enable plaintiff to secure title to more land

than plaintiff herself could legally locate," and had conveyed her interest to plaintiff; that plaintiff complied with the law in making her location; but that the premises were not subject to relocation. It decreed that plaintiff had no interest or estate in the premises, and that defendant Peard was owner, and entitled to the possession thereof.

There is, in the foregoing, a determination that a married woman who is a citizen, may make a valid location of mineral lands, and that such a claim is her separate property. Though much argument has been advanced for and against the soundness of this proposition, the question is not presented by this appeal. Appellant is not complaining, and respondent is not in position to object. The findings and conclusions are unassailed in this particular, and this consideration must be confined to a discussion of the objections of appellant.

The first of these objections is that the court did not find upon the claim of forfeiture, and that Peard had in fact, forfeited his claim by failure to do the legal amount of work thereon since the year 1890.

The facts in this regard have already been stated. The forfeiture pleaded was claimed to have resulted because of this failure. But, in the year 1890, defendant was ousted, and Henry Trevaskis and Ida Marion let into possession under the sheriff's deed. They maintained this possession as of their own right, and against Peard, continuously, until he had prevailed against them in his ejectment suit to recover the land. So long as Peard's suit was commenced within the time limited by the statute, he cannot be held to have forfeited his claim by a failure to perform the work under such circumstances. Otherwise, one might, by force, maintain possession for a year, and then assert a forfeiture against the dispossessed unfortunate owner.

The court found the facts of Peard's ouster by the claimants under the sheriff's deed, that they had continuously held

possession of the property ever since, and done the legal amount of work annually thereon, and that Peard had commenced, within the statutory time, an action in ejectment, which was then pending. While the ultimate fact that no forfeiture resulted is not found, yet that is the only determination which could follow the facts actually set forth, and, indeed, it is embraced in the conclusion that the ground was not subject to relocation at the time of plaintiff's entry for that purpose; for, had Peard forfeited, the land would have been relocatable.

The second objection is that no finding is made upon the question of abandonment. Abandonment was not pleaded, but evidence of abandonment may be given, without a special plea, under a denial of title. *Bell* v. *Bed Rock Co.*, 36 Cal. 214; *Willson* v. *Cleveland,* 30 Cal. 192. In the foregoing cases, proof was sought to be made by defendant denying plaintiff's title in ejectment. But we conceive the rule to be applicable to a case such as this. Plaintiff, by her pleading, called upon defendant to declare the nature of his claim. This he did by asserting rights under a location earlier than her own, which location if still valid, necessarily avoided her own; and she undertook to defeat the claim of a valid, prior, subsisting location by evidence of its abandonment. She was within her right in so doing.

The court, it is true, did not find upon the question of abandonment; but its declaration that the land was unlocatable at the time of plaintiff's entry carries with it the necessary deduction that there had been no abandonment. It may, for the purpose of this consideration, be treated as a finding to that effect.

Even so the evidence fails to support it. There is no conflict and it is, briefly, as follows: The witness Dean, for the plaintiff, testified that, after the foreclosure suit of *Stevens* v. *Peard,* Peard went away and was gone for two years. When he came back, witness asked him if he was going to the

claim (the claim in controversy) to work. "He said, 'No;' that it had cost him enough, in lawyers' fees and dead work; that he had abandoned it, and would never return there again unless he crossed it in going to some other place." Peard when called to the stand made no denial of this, but testified, "that in 1890 he moved the furniture, cooking stove, and other things he had, in a cabin he occupied on the claim, away, before he went to God's country; that he mined in God's country for over two years, and was never again on the claim until three weeks before he commenced suit against Trevaskis, Stevens and Mrs. Marion (December 2, 1893), when he went into their tunnel; that he knew of the sheriff's deed and location, under which Trevaskis and Stevens held possession, and, since his return from God's country, knew of the work they did on the claim; that he never ordered them to quit, or notified them that he owned the claim; that the reason he gave them no such information was because he intended to let them go ahead, if they saw fit, and develop the claim, and if they struck pay he would claim it; * * * that his counsel had informed him that the decree, certificate of sale, and sheriff's deed were invalid, and passed no title to the portion in section 2, as the complaint in that action only described the mining claim as being in section 35; * * * that, being so advised by his counsel, and knowing that his title to the property of the Mt. Charles in section 2 was good, although so sold to Simmons by the sheriff, he had held back while Trevaskis, Stevens, and Mrs. Marion were trespassing thereon; that it was their business to look out for their own title, and he was glad they were doing the work, as it would save him doing it; that he therefore laid back, never informed them he claimed any interest therein, or forbid them working; never claimed any of the gold they took out, or interfered with them in any manner, until he brought suit December 2, 1893." This is all of the evidence upon the question.

It is not a matter of regret that the scheme outlined by defendant's testimony is no better in law than it is in good conscience. Abandonment, it is true, is a matter of intent; but that intent may be proved by the acts and conduct of the party, even against his express declarations to the contrary (*Myers* v. *Spooner,* 55 Cal. 260), and if the intent had been formed, and once acted upon, the abandonment is as absolute, "if it exists for a minute or a second, as though it continued for years." *Waring* v. *Crow,* 11 Cal. 366.

In *Seymour* v. *Wood,* 53 Cal. 303, plaintiff in ejectment moved his possessions from the mining claim, and went to Mexico, where he followed mining for several years. He denied that he had abandoned his claim, but, admitted that he knew defendants were working it and had applied for a patent. The question of abandonment was submitted to a jury, which returned a verdict for plaintiff. This court said that the verdict should have been set aside, and a new trial ordered, as the abandonment was clearly established.

But the evidence in that case was not so convincing as that presented by this record. Defendant's admission of abandonment is not denied. He not only removed his effects from the claim, and prosecuted mining for years in another part of the country, but himself admits a conditional abandonment at least. He had abandoned it, unless others, by their work and labor, developed it into a paying property. No such conditional abandonment can be recognized. It must be all in all, or not at all, and there can be no hesitation in this case in declaring it to be absolute.

The judgment and order are reversed and the cause remanded for a new trial.

McFARLAND, J., and GAROUTTE, J., concurred.

ERASTUS F. HALLACK ET AL. v. LAFAYETTE TRABER ET AL.

(23 Colorado 14; 46 Pac. 110. Supreme Court. April 6, 1896.)

An additional location certificate of a mining claim must be based upon an original and relate back to the first location.

A trustee is not permitted to reap a profit or gain an advantage, directly or indirectly, from the trust estate or from his relation to it.

[1]Trustee relocating in his own name. One to whom interests in a mining claim had been conveyed for the purpose of obtaining a patent for the benefit of all the owners filed an amended or additional location certificate taking in additional territory and afterwards obtained a patent to the claim as described in the additional or amended certificate. *Held*, that the title to the territory thus acquired inured to the benefit of all the *cestuis que trust*.

Appeal from the District Court of Lake County.

ROGERS, CUTHBERT & ELLIS, for appellants.

J. E. HAVENS, for appellees.

CHIEF JUSTICE HAYT delivered the opinion of the court.

[1]See *Franklin Co.* v. *O'Brien*, 18 M. R. 331 and notes.

An agent if he relocates is a trustee for his principal. *Fisher* v. *Seymour*, 23 Colo. 542; 49 Pac. 30.

Patentee declared to hold in trust where owner had given him money to buy it in at tax sale. *O'Connor* v. *Irvine*, 74 Cal. 435; 16 Pac. 236.

Location made by one in his own name for benefit of another is the property of the beneficiary, the title being held in trust. *Book* v. *Justice Co.* 17 M. R. 617.

Party having authority to buy for another party advancing a certain sum, buys in fact for a larger sum—construction of the rights of the parties in such cases. *Wenham* v. *Switzer*, 59 Fed. 942.

One who has conveyed his interest in a claim in consideration of the grantee paying him half the profits of working or half the proceeds of sale has no remaining title in the property, legal or equitable. *Reagan* v. *McKibbin*, 11 So. Dak. 270; 19 M. R.—.

This is an appeal from a judgment upon pleadings, consisting of a complaint and answer. The undisputed facts are that the Little Nell lode mining claim, this being the property in dispute, was originally located by E. C. Cavanaugh and others, the location certificate being filed on June 11, 1889. Afterwards, by various conveyances, the title passed into the parties to this action, plaintiffs and defendants, who held the property as tenants in common.

While the property was so held it was deeded to Erastus F. Hallack, appellant, in trust, for the purpose of obtaining a patent thereto for the benefit of all the owners. Hallack, while so acting as tenant in common and trustee, filed an additional location certificate of the claim, taking in additional territory. Afterwards a patent was issued to Hallack for the Little Nell mining claim, as described in this amended or additional location certificate, and we are to determine upon these facts whether the additional territory is the sole property of appellant Hallack, discharged from any trust in reference thereto, or whether he holds the same in trust and can be required to deed to his cotenants interests in the additional territory upon the basis of their ownership in the Little Nell lode as originally located.

The second cause of action depends upon the first. It grows out of the same facts and the further fact that lessees of Hallack, the trustee, have paid to him certain amounts as royalties for ore taken from this additional territory. Plaintiffs ask to recover their proportionate share of such royalties. Judgment having been rendered in their favor in the court below upon both counts, the defendants appeal.

The amended location certificate filed by Hallack, the trustee, was filed by virtue of the following provision of our statute:

"If at any time the locator of any mining claim heretofore or hereafter located, or his assigns, shall apprehend that his original certificate was defective, erroneous, or that the requirements of the law

WILLIAM PEREGO v. W. H. DODGE ET AL.

(163 U. S. 160; 16 Sup. Ct. 971. Supreme Court. May 18, 1896.)

Equity case supporting adverse. The complaint being, in effect, a bill to quiet title as against an adverse claim, and the plaintiff having thus voluntarily invoked the equity jurisdiction of the court, he is in no position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law, and such an objection comes too late in the appellate tribunal.

Court not bound to submit issues. Where a case is one of equitable jurisdiction only, the trial court is not bound to submit issues of fact to a jury; and, if it does so, is at liberty to disregard the verdict and findings of the jury.

[1]**Where a party pursues the case as one in equity he cannot on appeal be heard to say that he has been deprived of his right of trial by jury.**

The right to a jury may be waived by the mere trial of the case without any demand for a jury.

[2]**Either at law or in equity. A suit supporting an adverse claim required by R. S. §2326, as amended by the act of 1881 referring to the "jury" finding title in neither party is not necessarily an action at law. In a proper case a bill to quiet title lies and if at law the jury trial may be waived.**

Appeal from the Supreme Court of the Territory of Utah.

Action by William Perego against W. H. Dodge, E. P. Ferry, A. B. Richardson, J. N. Jacobson, Martin McGrath, and Mrs. Martin McGrath. From a judgment of the territorial Supreme Court affirming a judgment for defendants (33 Pac. 221), plaintiff appeals. Affirmed.

This was a suit brought by William Perego against W. H.

[1] *Derry* v. *Ross*, 1 M. R. 1.

[2] *Book* v. *Justice Co.* 58 Fed. 827. *Murray* v. *Polglase*, 23 Mont. 401; 59 Pac. 439. *Young* v. *Goldsteen*, 97 Fed. 303. *Durgan* v. *Redding*, 103 Fed. 914. Mining Rights 11th Ed. 441. Lindley 2nd. Ed. § 754. Snyder § 715.

A suit already pending may be treated as a suit in support of an adverse claim. *Axiom Co.* v. *Little*, 6 S. Dak. 438; 61 N. W. 441. *Jones* v. *Pacific Co.* (Ida.) 72 Pac. 956.

Dodge and others in the district court for the third judicial district of the Territory of Utah, in pursuance of the provisions of section 2326 of the Revised Statutes. The complaint alleged the title of plaintiff to a mining claim, called the Perego, of which he averred he was in possession; described it; and stated the date of location, existence of the vein, and the other facts entitling him to a decree founded upon such title. It was then alleged that defendants had made application for a patent to certain mining claims known as the Mayflower Nos. 4 and 5, and that they had wrongfully surveyed said claims so as to conflict with plaintiff's claim, and, after describing the area in conflict, averred that notice of the application for patent by defendants was published; that, within the 60-day period of publication, plaintiff filed in the land office his adverse claim, and brought this suit within 30 days thereafter. Plaintiff prayed judgment and relief against defendants; "that the plaintiff is the owner and lawfully in and entitled to the possession of the last above described premises, the area in conflict between the said Perego mining claim and the alleged consolidated claim of Wm. H. Dodge et al. upon alleged Mayflower No. 4 and Mayflower No. 5 lode locations and the lodes therein, and quieting and confirming plaintiff's title thereto and possession thereof; that the defendants have no title to or right of possession of said conflict area, or the lodes therein, or any part thereof; that the defendants be restrained pending the action and upon trial perpetually from entering in or upon said conflict area, or the lodes thereon, or any part thereof, or mining in or extracting any ores or mineral therefrom, and from in any way interfering with the possession thereof; also, that the plaintiff have all other and further proper relief, with costs of suit."

Defendants answered, denying the material allegations of the complaint, and further affirmatively set up the necessary jurisdictional facts of their location, averred that the

required assessment work had been fully performed, claimed a valid location of the Mayflower Nos. 4 and 5, and prayed that defendants be adjudged to be the owners and entitled to the possession of the said Mayflower Nos. 4 and 5 lodes and mining claims, including the area in conflict, and for all other proper relief, and for costs of suit.

The case came on for trial, and the parties appeared by their attorneys, as the record states, "present and ready for trial, and the case is tried before the court." The trial occupied three days, May 6, 7, and 9, 1891, and on May 11th the following entry was made: "This case having been heretofore tried and submitted to the court, and the court, being now fully advised, finds the issues for the defendants, and it is ordered that decree be entered herein in favor of the defendants, and against the plaintiff, and quieting and confirming the title of the defendants to the area in conflict herein, and plaintiff is allowed thirty days' stay and the same time to file notice of motion and statement on motion for new trial." The district court made findings of fact and conclusions of law, which commenced as follows: "This cause duly coming on for trial on the merits before the court without a jury, and the court having heard the pleadings, evidence, and arguments of the respective counsel, the court now makes and files the following findings of fact and conclusions of law." The court found the claims of defendants valid, and that of plaintiff invalid as against defendants, and that defendants were entitled to a decree "adjudging them to be the owners (subject only to a paramount title of the United States) and in and entitled to the possession of the whole and every part of the said Mayflower No. 4 and Mayflower No. 5 lode mining claims, and, as part thereof and belonging thereto, the conflict areas described in the complaint, and the whole thereof, and adjudging that the plaintiff had not at the time he filed his protest and adverse claim, or at any time since, and has not now, any right, title, or interest in

or to said or any part of said conflict areas described in the complaint, and forever enjoining, estopping, and debarring the plaintiff, and any and all persons claiming by, through, or under him, from at any time setting up any claim of right or title to said or any part of said mining claim or conflict area, and forever confirming and quieting the defendant's right and title thereto, and awarding the defendants their costs herein as against the plaintiff."

These findings and the decree in accordance therewith were filed and entered on August 18, 1891. On August 5, 1892, plaintiff, acting through other counsel than appeared at the trial, filed a notice of intention to move the court to set aside and vacate the findings and decision and decree, and for a new trial, on the ground: "(1) Irregularity in the proceedings of the court by which the plaintiff was prevented from having a fair trial; (2) errors of law occurring at the trial, to wit, the trial of said cause by the court without a waiver of jury by the plaintiff; (3) because the findings and decree are irregular and void as appears by the record." This notice was accompanied by an affidavit that the value of the property exceeded $1,000; that plaintiff had not by himself in person or by attorney, at any time, orally or in writing, waived his right of trial by jury in said suit, and that he had at all times desired to have the same tried by a jury; that no notice of the decision of the court in the cause had been served upon him or his attorney.

Notice of appeal to the Supreme Court of the Territory of Utah was filed August 15, 1891, and on August 16th plaintiff was allowed 30 days' time to file an undertaking on appeal. On September 3d a new notice was served of the motion to vacate and set aside the findings and decree, and for new trial. On September 10th, 30 days were allowed plaintiff for an undertaking on appeal. On September 19th the motion to vacate and set aside the decree and grant a new trial was submitted and overruled; and on October 4, 1892,

notice of appeal from that order was given, and an undertaking on appeal was subsequently filed. No statement or bill of exceptions appears in the record. The case was brought to a hearing in the Supeme Court of the Territory of Utah, and the judgment of the district court was affirmed, with costs. 9 Utah, 3, 33 Pac. 221. Affidavits of the value of the matter in dispute were submitted, and an appeal allowed to this court.

Errors were assigned to the effect that the Supreme Court of Utah erred in affirming the decree of the district court, in that the district court should have dismissed the complaint, because in equity, when the remedy was at law; should not have awarded defendants affirmative relief in the absence of a cross complaint, and should not have tried the case without a jury.

B. F. LEE and GERALD G. P. JACKSON, for appellant.

ARTHUR BROWN and WM. H. DICKSON, for appellees.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

In the Territory of Utah there was but one form of action, legal or equitable, through the intervention of a jury or by the court itself, according to the nature of the relief sought, provided, however, that no party could be "deprived of the right of trial by jury in cases cognizable at common law." Rev. St. § 1868; Act April 7, 1874, c. 80, § 1; 18 Stat. 27; Comp. Laws Utah, § 3126; *Improvement Co.* v. *Bradbury*, 132 U. S. 509, 513, 10 Sup. Ct. 177.

By section 3468 of the Code of Civil Procedure of Utah, an action might be brought by any person against another who claimed an estate or interest in real property adverse to him, for the purpose of determining such adverse claim; and

this complaint was, in effect, a bill to quiet title, as against an adverse claim, and prayed, accordingly, for a decree quieting plaintiff's title, and adjudicating that defendants had no title or right of possession, for injunction, and for general relief.

We are of opinion that it was competent for the district court to grant the relief sought, and that it had jurisdiction of the subject-matter. Plaintiff, having voluntarily invoked the equity jurisdiction of the court, was not in a position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law. Even a defendant, who answers and submits to the jurisdiction of the court, and enters into his defense at large, is precluded from raising such an objection on appeal for the first time. *Reynes* v. *Dumont,* 130 U. S. 354, 395, 9 Sup. Ct. 486; *Kilbourn* v. *Sunderland,* 130 U. S. 505, 9 Sup. Ct. 594; *Brown* v. *Iron Co.* 134 U. S. 530, 536, 10 Sup. Ct. 604. Nor did the Supreme Court of Utah err in overruling the contention that affirmative relief was improperly awarded defendants, because they had filed no cross complaint. Such relief was sought by the answer, which was treated by the parties and proceeded on by the court as equivalent to a cross pleading. The objection came too late in the appellate tribunal. *Coburn* v. *Cedar Val. Co.,* 138 U. S. 196, 221, 11 Sup. Ct. 258.

Section 2325 of the Revised Statutes points out how patents for mineral lands may be obtained. Application is filed in the proper land office as therein prescribed, and notice of such application published; and, if no adverse claim is filed at the expiration of 60 days of publication, it is assumed that the applicant is entitled to a patent, and that no adverse claim exists.

Section 2326 provides as follows:

"Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries,

and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

It is then provided that after judgment the party shall file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor general as to the requisite amount of labor or improvements, and that the whole proceedings and the judgment roll shall be certified by the register to the commissioner of the general land office, whereupon a patent shall issue for the claim.

Thus, the determination of the right of possession as between the parties is referred to a court of competent jurisdiction, in aid of the land office, but the form of action is not provided for by the statute; and, apparently, an action at law or a suit in equity would lie, as either might be appropriate under the particular circumstances,—an action to recover possession when plaintiff is out of possession, and a suit to quiet title when he is in possession.

In the case before us, plaintiff averred that he was in possession, and framed his complaint in that aspect. Having instituted his suit as an equity cause, issues were made up, and the case heard and disposed of, and went to decree as in equity; and nearly a year afterwards he carried the case to the Supreme Court of the Territory, and complained that the decree was fatally erroneous, in that a jury trial was not had. But, where a case is one of equitable jurisdiction only, the trial court is not bound to submit any issues of fact to a jury,

and, if it does so, is at liberty to disregard the verdict and findings of the jury, "either by setting them or any of them aside, or by letting them stand, and allowing them more or less weight in its final hearing and decree, according to its own view of the evidence in the cause." *Improvement Co.* v. *Bradbury,* 132 U. S. 515, 10 Sup. Ct. 177.

By his selection of this form of action, and his proceeding to a hearing and decree without objection, his present contention in respect of deprivation of trial by jury came too late. Even if the action should have been an action at law, still the court had jurisdiction, and a defective exercise of its power would only amount to an irregularity capable of being waived by the parties, and susceptible of correction, as any other mere errors are corrected. Indeed, if the case were treated as an action at law, the trial by jury might have been waived, and we think was waived in this instance.

By the fourth section of the act of congress of March 3, 1865 (13 Stat. 500, c. 86), carried forward into sections 649 and 700 of the Revised Statutes, it was enacted that "issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury."

In *Kearney* v. *Case,* 12 Wall. 275, this statute was considered, and it was held that parties might waive a jury, as they could before the act was passed, without filing a written stipulation, but that in such case no error could be considered in the action of the court on such trial, and that parties would be presumed in this court to have waived their right to trial by jury of issues of fact whenever it appeared that they were present at the trial in person or by counsel, and made no demand for a jury. See, also, *Bond* v. *Dustin,* 112 U. S. 604, 5 Sup. Ct. 296.

By section 3340 of the Code of Utah, issues of fact in

actions at law are required to be tried by a jury; and by section 3378 provision is made for the waiver of a jury as therein prescribed. But, as ruled in *Kearney* v. *Case,* the right may be otherwise waived, and such waiver be sufficient to support the judgment, though not sufficient to authorize the review of the rulings of the court at the trial. Tested by any rule, there can be no question that this record shows such waiver here. It is true that on the motion to vacate the decree and for a new trial, an affidavit was filed that there was no waiver orally or in writing in person or by attorney; but we suppose that to mean a waiver according to section 3378, and that was not material. Moreover, the supreme court held that the notice of intention to move for a new trial, the affidavit, and the minutes of the trial court were no part of the record, because not embodied in any statement of case or bill of exceptions; and that appears to be the settled rule in that jurisdiction.

But it is insisted that by force of the act of Congress of March 3, 1881, c. 140, 21 Stat. 505, this class of cases must be disposed of on trial by jury according to the course of the common law, and that either these entire proceedings were absolutely void, not for want of equity, but for want of power, or that, at all events, the requirement of trial by jury is imperative, and cannot be waived, and that the seventh article of Amendment and the law were violated by proceeding to judgment without it.

The amendatory act provides: "That if, in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent to the land in controversy until he shall have perfected his title." We do not think the intention of this act was to change the

methods of trial. Its manifest object was to provide for an adjudication, in the case supposed, that neither party was entitled to the property, so that the applicant could not go forward with his proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. In other words, the duty was imposed on the court to enter such judgment or decree as would evidence that the applicant had not established the right of possession, and was for that reason not entitled to a patent. The whole proceeding is merely in aid of the land department, and the object of the amendment was to secure that aid as much in cases where both parties failed to establish title as where judgment was rendered in favor of either; and, while the finding by a jury is referred to, we think that where the adverse claimant chooses to proceed by bill to quiet title, and, as between him and the applicant for the patent, neither is found entitled to relief, the court can render a decree to that effect, just as it would render judgment on a verdict if the action were at law. If Congress had intended to provide that litigation of this sort must be at law, or must invariably be tried by a jury, it would have said so. There is nothing to indicate the intention thus to circumscribe resort to the accustomed modes of procedure, or to prevent the parties from submitting the determination of their controversies to the court.

It must be remembered that it is "the question of the right of possession," which is to be determined by the courts, and that the United States is not a party to the proceedings. The only jurisdiction which the courts have is of a controversy between individual claimants, and it has not been provided that the rights of an applicant for public lands as against the government may be determined by the courts in a suit against the latter. *U. S.* v. *Jones,* 131 U. S. 1, 9 Sup. Ct. 669; *Last Chance M. Co.* v. *Tyler M. Co.,* 157 U. S. 683, 694, 15 Sup. Ct. 733.

It was held by Mr. Justice Lamar, when Secretary of the

Interior, that, notwithstanding the judgment of a court on the question as to the right of possession between two litigants, it still remained for the land department to pass on the sufficiency of the proofs, and to ascertain the character of the land, and whether the conditions of the law had been complied with in good faith before the government parted with the title. 4 Land Dec. 314, 316. But whatever the extent of the conclusiveness of a judgment under the statute, and granting that the government may be said to be interested in respect to the possessory title, we do not regard the act of March 3, 1881, as intended to require or requiring all suits under section 2326 to be actions at law, and to be tried by a jury.

Judgment affirmed.

[1]BLACK v. ELKHORN MINING CO.

(163 U. S. 445; 16 Sup. Ct. 1101. Supreme Court. May 18, 1896.)

[2]**No dower in possessory claim.** A locator of an unpatented mining claim under the laws of the United States, having only the possessory rights conferred by those laws, has not such an interest in the property as will sustain a claim for dower therein, against the grantee of the husband.

Abandonment by sale. The conveyance of all interest in a possessory claim is an abandonment of all his estate in favor of the grantee.

Error to the Circuit Court of Appeals for the Ninth Circuit.

THOMAS H. CARTER, ROBERT B. SMITH and ROBERT L. WARD, for plaintiff in error.

W. E. CULLEN and J. K. TOOLE, for defendant in error.

MR. JUSTICE PECKHAM delivered the opinion of the court.

This is a writ of error to the Circuit Court of Appeals for the Ninth circuit. The action was brought by the plaintiff in error for the purpose of recovering dower in a mining claim in Montana a fractional interest in which was owned by her husband during coverture. The question is whether a mere locator of a mining claim in the state of Montana and under the laws of the United States, and having only the possessory rights conferred by those laws, has such an estate

[1]Affirming 52 Fed. 859. The original case, 49 Fed. 549, contains a learned exposition of the nature of inchoate estates. The Circuit Court of Appeals affirmed the judgment with some dissent from views of the lower Court.

[2]Widow has right to opened mine and may take out to sell and may make new openings. *Whittaker* v. *Lindley*, (Ky.) 8 S. W. 9. *Lenfers* v. *Henke*, 5 M. R. 68.

in the property as will sustain a claim for dower therein. The claim is made by the plaintiff, as widow, under the statute of Montana relating to dower (1 Laws Mont. 1876, c. 63), which reads as follows: "A widow shall be entitled to a third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage unless the same shall have been relinquished in legal form. Equitable estates shall be subject to a widow's dower, and all real estate of every description contracted for by the husband during his lifetime, the title to which may be completed after his decease." Another statute of Montana provides that "the word 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements and hereditaments, and all rights thereto and all interests therein." Comp. Laws Mont. p. 248, § 202.

The case was commenced in the state court and was subsequently removed, on the petition of the defendant, to the United States Circuit Court for the district of Montana. The facts upon which the question arises appear in the pleadings, and the question was raised by demurrer.

The plaintiff is the widow of one Leander W. Black, who died intestate in July, 1881. During his lifetime, and while the plaintiff was his wife, Black owned an undivided two-fifths of a certain mining claim situate in the then territory of Montana, called the "A. M. Holter Quartz Lode." On the 7th of March, 1879, Black sold and conveyed his interest in this claim to one Burton, who took possession thereof, but the plaintiff did not join in that conveyance. The interest conveyed by him to Burton subsequently passed by various mesne conveyances to the defendant in error. On the 29th of October, 1883, an application was made to the proper United States land office by the immediate predecessor in interest of the defendant in error to enter the claim for patent, and such proceedings were had in the matter of the applica-

tion that on the 19th of November, 1889, a patent therefor was issued by the United States to the applicant, covering the whole interest in the mining claim. No protest or adverse claim or objection of any character was made or filed by the plaintiff in error at any stage of such proceedings in the land department. Upon these facts the Circuit Court held that the plaintiff had a contingent dower interest in the mining claim, under the Montana statute, although none in the interest the United States retained in such mining lands prior to the locator becoming entitled to a patent therefor; but that by the granting of a patent by the United States to the defendant's predecessor the estate or interest in the lands called a mining claim ceased to exist, and the title to the whole land passed to the patentee, the mining claim became merged in the paramount title and perished, and no estate was in the defendant out of which plaintiff could ask to have dower assigned.

Upon writ of error sued out by the plaintiff to review the judgment rendered against her by the Circuit Court, the case was argued before the United States circuit court of appeals for the Ninth circuit, where the judgment was affirmed. That court held that the locator, before he made any application to purchase, or paid any of the purchase money, had no such estate in the mining claim, as against the government or its grantee, as that a right of dower could be founded thereon by virtue of any state legislation, and it therefore affirmed the judgment of the Circuit Court. 7 U. S. App. 393, 3 C. C. A. 312, and 52 Fed. 859. The plaintiff brings the case here for a review of the judgment against her in the Court of Appeals.

The two courts, while not precisely harmonious in their views as to the principles upon which the judgment should be rested, yet agreed in the result that the plaintiff was not entitled to dower. It was stated on the argument here that

there is no decision of the Supreme Court of the state of Montana construing the state statute on the subject of dower, so far as regards this question.

The first question that presents itself is, what is the character of the interest which a locator has in a mining claim under the Revised Statutes of the United States, and prior to the time that he has made any application to purchase, or paid any of the purchase money, and where no patent has been issued to him for the land? Also, what interest does he convey by a conveyance purporting to convey it all, but in which his wife does not join?

The Revised Statutes provide that:

"Sec. 2318. In all cases land valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

"Sec. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase by citizens of the United States. * * *"

Section 2320 states the conditions governing mining claims already located as to length, etc., and also as to those located after the 10th of May, 1872. But it is provided that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

Section 2322 gives to locators of all mining claims and their heirs and assigns, as stated therein, "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes and ledges throughout their entire depth, the top or apex of which lies" as described in said statute.

It does not, by its terms, grant any right to the wife of the locator, either present or contingent. Being the owner of the lands, the government could, of course, impose its own

terms upon which to grant any right, whether of possession or of purchase.

By section 2324 certain conditions are imposed upon locators, upon a failure to comply with which the claim is rendered open to a relocation the same as if never before located. One of the conditions is the following: "On each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year." The section also contains a provision that: "Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditure."

A patent can be obtained under section 2325, which provides generally for the filing of an application, under oath, for such patent with the register of the proper land office, and also for the publication of that application, and, if no adverse claim is filed with the register within the period stated by the statute, it is to be assumed that the applicant is entitled to a patent upon the terms therein mentioned; and it is then provided in the section that "thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 provides for the course to be pursued in case an adverse claim is filed, and for the issuing of a patent after

a decision by a court of competent jurisdiction of the question as to which of the parties is entitled thereto. *Perego* v. *Dodge,* 163 U. S. 160, 16 Sup. Ct. 971.

It has been held that this character of interest thus outlined is property, and it is recognized as such in those states of the West whose inhabitants are interested in mines. These claims are subjects of bargain and sale, and constitute, as it is said, very largely the wealth of the Pacific coast states; and the right to sell, transfer, mortgage and inherit them is recognized by the courts. *Forbes* v. *Gracey,* 94 U. S. 762-766; *Belk* v. *Meagher,* 104 U. S. 279, 283; *Manuel* v. *Wulff,* 152 U. S. 505, 510, 14 Sup. Ct. 651.

Mr. Justice Miller, in the course of his opinion in *Forbes* v. *Gracey, supra,* stated: "It is very true that Congress has by statutes and by tacit consent permitted individuals and corporations to dig out and convert to their own use the ores containing the precious metals which are found in the lands belonging to the government without exacting or receiving any compensation for those ores, and without requiring the miner to buy or pay for the land. It has gone further, and recognized the possessory rights of these miners, as asserted among themselves by the rules which have become the laws of the mining districts as regards mining claims, * * * *but in doing this it has not parted with the title to the land, except in cases where the land has been sold in accordance with the provisions of the law upon that subject.*"

The interest in a mining claim, prior to the payment of any money for the granting of a patent for the land, is nothing more than a right to the exclusive possession of the land based upon conditions subsequent, a failure to fulfill which forfeits the locator's interest in the claim. We do not think that under the federal statute the locator takes such an estate in the claim that dower attaches to it.

To sum up as to the character of the right which is granted

by the United States to a locator, we find: (1) That no written instrument is necessary to create it. Locating upon the land, and continuing yearly to do the work provided for by the statute, gives to and continues in the locator the right of possession as stated in the statute. (2) This right, conditional in its character, may be forfeited by the failure of the locator to do the necessary amount of work; or if, being one among several locators, he neglects to pay his share for the work which has been done by his co-owners, his right and interest in the claim may be forfeited to such co-owners under the provisions of the statute. (3) His interest in the claim may also be forfeited by his abandonment, with an intention to renounce his right of possession. It cannot be doubted that an actual abandonment of possession by a locator of a mining claim, such as would work an abandonment of any other easement, would terminate all the right of possession which the locator then had.

An easement in real estate may be abandoned without any writing to that effect, and by any act evincing an intention to give up and renounce the same. *Snell* v. *Levitt,* 110 N. Y. 595, 18 N. E. 370, and cases cited at page 603, 110 N. Y., and page 370, 18 N. E., of opinion of Earl J.; *White* v. *Railroad Co.,* 139 N. Y. 19, 34 N. E. 887. If the locator remained in possession, and failed to do the work provided for by statute, his interest would terminate; and it appears to be equally plain that if he actually abandoned the possession, giving up all claim to it, and left the land, that all the right provided by the statute would terminate under such circumstances. If he convey to another a right which may be thus lost, that conveyance would seem to be equivalent to an abandonment by him of all rights under the statute. What could be better evidence of an intention to abandon than an actual conveyance of his right to another, ceasing to do any work thereon, and the giving up of his possession in accordance with his conveyance. The abandonment by simply leaving

the land is no more efficacious than conveying his rights, and also leaving possession without any intention of returning. His simple abandonment would leave no right remaining in his wife to claim dower upon his death in the interest thus abandoned. If he add a conveyance as a clearer evidence of abandonment, her alleged right to dower is not strengthened.

By the terms of the statute there is no grant of any right to the wife. It is granted to the locator and to his heirs and assigns, and there is no condition that hampers the right to convey by incumbering it with an inchoate right of dower. And until he does some act towards paying the purchase money he obtains no vested right of purchase or claim to a patent. *Benson M. & S. Co.* v. *Alta M. & S. Co.,* 145 U. S. 428, 12 Sup. Ct. 877; *Shepley* v. *Cowan,* 91 U. S. 330.

The last cited case arose under the statute in relation to a settler seeking to acquire the right of pre-emption in certain lands, yet the same principle applies to a case of one who had located land, and is in possession thereof, but has paid nothing on account of the lands, and has made no effort to purchase the same. An abandonment, therefore, by the locator, surrenders merely a right to the exclusive possession, as provided for in the statute, which exclusive possession remains during the pleasure of the government. An abandonment of it by leaving it, not intending to return, or a conveyance of his interest to a third party, would seem equally to terminate that interest, and effectually to bar all possible future claim, if any ever existed, on the part of his wife to dower in such premises.

By conveying his interest as locator, he not only ceases to do any work on the claim as provided for by statute, but he puts another in possession with all his rights to do the work called for by it, and gives him the right to do all that he could have done towards purchasing the land itself. When the grantee does the work, and then obtains a patent, it ought not to be burdened with any right of dower in the

widow of his grantor, who had, by his conveyance, abandoned all his rights, and given up the possession upon which they were based. The statute, by expressly providing that the locator and his heirs and assigns should have the rights, clearly meant to provide for a conveyance thereof to the grantee to the same extent that they were possessed by the grantor.

We are of opinion, therefore, that by the conveyance of Mrs. Black's husband to his grantee of all his interest as locator in the mining claim in question he abandoned all his right and interest in the claim to his grantee, and that interest which thus passed to his grantee was not subject to any possible incumbrance of the wife by way of dower in the premises. The interest granted by the United States was of such a nature that a conveyance of Black's right to the possession terminated it to the same extent as if it had been forfeited by nonperformance of the conditions provided for in the statute, and hence the wife has no claim for dower in the premises.

The judgment is

Affirmed.

JOHN EDMONDS ET AL. v. GEORGE MOUNSEY.

(15 Indiana App. 399; 44 N. E. 196. Appellate Court. May 26, 1896.)

Assignee bound. The assignees of a natural gas and oil lease are bound by their acceptance of such lease, to make good the covenants contained in the lease to pay rent, and such obligations are not postponed until actual entry upon the land.

[1]**Covenants to pay Royalties run with the land** and in a suit by a lessor of a natural gas lease, against an assignee of such lease, it is not necessary to plead an assumption thereof by such assignee, nor is such transaction affected by the statute of frauds.

Back rent. Surrender. A condition in a lease that a surrender thereof by lessee should satisfy all damages between the parties thereto, applies to future rentals and not to rentals already accrued.

[2]**One tenant in common** of a lease cannot, without the consent of his co-tenants, bind their interests by a surrender of such lease.

Lessor must elect to forfeit. A provision in an oil and gas lease that a failure to complete an oil well on the leased premises, or make payment of a specified rental, shall render the lease null and void, is not effective in behalf of the lessee unless the lessor so elects.

A joint motion for new trial by all the defendants, on the ground that the verdict is excessive, is properly denied unless the verdict was wrong as to all of the defendants.

Too general exception to instructions. A motion for a new trial on the ground of error in giving several instructions is properly denied unless all the instructions were erroneous.

Appeal from Circuit Court, Blackford county; Edwin C. Vaughn, Judge.

Action by George Mounsey against John Edmonds and others to recover rent under a written lease. Judgment for plaintiff, and defendants appeal. Affirmed.

[1]*Jackson* v. *O'Hara*, 183 Pa. 233; 19 M. R.—. *Stone* v. *Marshall Co.* 188 Pa. 602; 19 M. R.—. *Cons. Coal Co.* v. *Peers*, 166 Ill. 361; 46 N. E. 1105. The reserve of a bonus does not run with the land. *Fisher* v. *Guffey*, 193 Pa. 393; 44 Atl. 452.

[2]See *Hooks* v. *Forst*, 18 M. R. 139.

Construction of joint lease by adjoining mine owners after one of

A. N. MARTIN and W. H. EICHHORN, for appellants.

J. CANTWELL, S. W. CANTWELL and L. B. SIMMONS, for appellee.

GAVIN, J. Appellee sued to recover the rental payable according to the terms of a gas and oil lease executed February 1, 1890, by appellee to appellant Edmonds, who on March 6, 1890, duly sold, transferred, assigned, and conveyed the same in writing, to appellants Slack, Spellacy, Palmer, and Twibell, by one of whom a one-sixth interest was in September, 1890, conveyed to appellant Sinneman.

Appellants demurred and answered by general denial, and specially setting up a surrender of the lease.

By the terms of the lease, appellee, in consideration of one dollar and the covenants therein contained, "granted, demised, and let" unto said Edmonds, his heirs and assigns, for the purpose and with the exclusive right of drilling and operating for petroleum and gas, the tract of land therein described, with rights to take water, lay pipes, remove fixtures, etc., for a period of five years, and as much longer as oil or gas should be found or produced in paying quantities. In consideration thereof the lessee agreed to give and pay certain royalties, and to complete a well on said premises within six months, and, in case of failure to so do, to pay to appellee

them had sold his claim to the lessee. Lessee held to pay proper royalty to the remaining lessor. *Higgins* v. *California Co.* 109 Cal. 304; 41 Pac. 1087.

In such a case the lessee cannot make use of the privilege to take asphalt from any part of the tract and so take only from his own part. *Id.*

Lessee taking lease from two adverse claimants when sued for rent cannot compel them to interplead. *Standley* v. *Roberts*, 59 Fed. 836.

One taking a lease of a half interest from one of the co-owners cannot plead that the lease was void for want of the consent of the other co-owner, such co-owner having made no objections. *C. F. & I. Co.* v. *Pryor*, 25 Colo. 540; 19 M. R.—.

for such delay a yearly rental of one dollar per acre on the premises leased, from said time for completing the well until such completion, the "said rental, amounting to $120, to be paid at the Bluffton bank, or direct to appellee," "and a failure to complete such well, or make such payment or deposit, as above mentioned, shall render this lease null and void, and to remain without effect between the parties hereto."

If lessee "is in default in any of the agreements of this contract, it is agreed that second party is to have sixty days after receiving written notice of such default to fulfill the requirements of such default, before this lease shall become null and void. The surrender of this lease by second party satisfies all damages between the parties hereto." All conditions were to apply to lessee's assigns.

The complaint seeks to recover the annual rental of $120 during the time no well was sunk; none having been put down at any time, and no payment ever having been made.

No sufficient objection has been presented to the complaint. It is good, as against each of the appellants, for some amount, at least, and that enables it to withstand the demurrer. The original lessee is bound by the contract to make the payments. The assignees are bound, by their acceptance of the lease, to make good the covenants to pay rent therein contained. Their liability is upon the covenants, and arises, not from any express assumption or agreement to pay it which might be contained in the written assignment, but from the privity of estate, by reason of their ownership and right to enjoy the benefits of the lease. Covenants to pay rent and royalties run with the land. *Mining Co.* v. *Casteel,* 73 Ind. 296; *McDowell* v. *Hendrix,* 67 Ind. 513; *Gordon* v. *George,* 12 Ind. 408; *Stewart* v. *Railway Co.,* 102 N. Y. 607, 8 N. E. 200.

The law is aptly expressed in *Bonetti* v. *Treat,* 91 Cal. 223, 27 Pac. 612: "The assignee is answerable for the rent during his ownership of the term under the assignment, and his

liability therefor arises out of the privity of estate, and this without reference to any obligation assumed by him in the contract of assignment."

Counsel suggest that the assignees are not liable, because they never actually took possession of any part of the land, nor commenced operations thereon.

The authorities do not seem to be agreed as to whether, in ordinary leases, the assignee must be in actual possession, to fix upon him the obligation to pay rent as provided in the lease. In Tayl. Landl. & Ten. § 450, it is said: "An actual entry upon the demised premises by an assignee is not requisite, in order to charge him with the performance of covenants running with the land; for by accepting an interest under the conveyance he incurs the responsibility connected with the estate, to the same extent as if he had taken possession in fact." In this view of the law he is sustained by a well considered opinion of Sutherland, J., in *Walton* v. *Cronly's Adm'r,* 14 Wend. 63, as also by the following cases: *Walker* v. *Reeves,* 2 Doug. 461, note; *Williams* v. *Bosanquet,* 1 Brod. & B. 238, overruling *Eaton* v. *Jaques,* 2 Doug. 455; *Burton* v. *Barclay,* 7 Bing. 745; *Cook* v. *Harris,* 1 Ld. Raym. 367; *Babcock* v. *Scoville,* 56 Ill. 461; *Board, etc., of St. Louis Public Schools* v. *Boatman's Insurance & Trust Co.,* 5 Mo. App. 91; *Smith* v. *Brinker,* 17 Mo. 148; *Willi* v. *Dryden,* 52 Mo. 319; *University of Vermont* v. *Joslyn,* 21 Vt. 52. Other text-book writers have taken the same view of the law. 1 Wood, Landl. & Ten. § 332; 2 Platt, Leases, 422; 1 Woodf. Landl. & Ten. 260.

In *Damainville* v. *Mann,* 32 N. Y. 197, the assignee of an undivided interest in a leasehold, in possession of the whole, was held liable for the entire rent, to the exclusion of the assignee and owner of a part interest, who was out of possession, the privity of estate which creates the liability being declared to be one based on actual possession and enjoyment. In *Carlin* v. *Hammel,* 18 Barb. 608, it is asserted (although

unnecessary) that possession is the foundation and boundary of the liability of the assignee.

In numerous cases where possession was in fact taken, in considering the liability of the assignee the courts use language indicating that the possession may be a material factor in creating the liability.

In these, however, the court's attention was not directed to the proposition of whether the liability arose from the actual enjoyment, or the legal right to enjoy the estate.

In *Sanders* v. *Partridge,* 108 Mass. 556, the court limits the liability, without actual entry, to cases where the transfer is by deed duly recorded, but no authority is cited for the limitation. The overwhelming weight of authority, both in England and this country, is against the doctrine that actual entry is essential to the assignee's liability.

Whatever may be the rule as to an ordinary lease, where the subject-matter is susceptible of actual possession and physical enjoyment, as to rights created by leases such as this, where, until the well is commenced, there can be no further enjoyment than the possession of the right which may be exercised at will, the authorities bearing directly upon the proposition involved authorize us to declare that the obligations of the assignees are not postponed until actual entry upon the land.

In *Fennell* v. *Guffey* (Pa.) 20 Atl. 1048, with reference to a lease and claims similar to those here involved, it is said: "It is settled law that covenants to pay rent or royalty run with the land, and that the assignee of the lease is liable for the payment of all rents or royalties which accrued while he held the assignment of the lease."

The doctrine of this case has been followed by *Fennell* v. *Guffey* (Pa.) 25 Atl. 785; *Springer* v. *Gas Co.* (Pa.) 22 Atl. 986; *Aderhold* v. *Supply Co.* (Pa.) 28 Atl. 22.

With these views of the law, it was not required that

appellee should plead any assumption by appellants, nor does the statute of frauds enter into the case.

The provision avoiding the lease in case of default by the lessee inures to the benefit of the lessor, and is not effective in behalf of the lessee unless the lessor so elects. *Appeal of Wills* (Pa.) 18 Atl. 721; *Ray* v. *Gas Co.* (Pa.) 20 Atl. 1065; *Creveling* v. *Iron Co.* (N. J.) 16 Atl. 184; *Cochran* v. *Pew* (Pa.) 28 Atl. 219; 2 Tayl. Landl. & Ten. § 492.

The court correctly construed the clause by which a surrender should satisfy all damages between the parties to apply to the future, and not to rentals then accrued. The construction contended for—that all right to past rentals was thereby lost—would practically vitiate other substantial provisions of the lease. As said in *Galey* v. *Kellerman* (Pa.) 16 Atl. 474, "We should need the constraint of insurmountable necessity to induce us to adopt the construction for which counsel contend."

Courts lean to such interpretations and applications of the language used as will give effect to all parts of the contract, and produce reasonable results. *Oil Co.* v. *Blake*, 13 Ind. App. 680, 42 N. E. 234; *McMillan* v. *Philadelphia Co.* (Pa.) 28 Atl. 220.

The amount of the recovery is questioned by all the appellants jointly, by motion for new trial. Unless the verdict is wrong as to all the motion was properly overruled. *Kelley* v. *Kelley*, 8 Ind. App. 606, 34 N. E. 1009; Elliott, App. Proc. § 839.

There is no evidence that the attempted surrender of the lease was authorized by all the appellants, nor that it was the act of more than one,—Spellacy. One tenant in common cannot, without the consent of his co-tenants, bind their interests by a surrender. *Williams* v. *Vanderbilt,* 145 Ill. 238, 34 N. E. 476.

It is doubtless true, as decided by some of the cases cited

by appellants, that a surrender may be inferred from an abandonment of the lease, under some circumstances; but there are no facts here to bring the case within the rule thus established, nor is there anything in *Wolf* v. *Guffey* (Pa.) 28 Atl. 1117, to aid appellants.

In the motion for new trial it is said, "The court erred in giving instructions numbered one, three, four, five, six, seven, eight, nine, ten, and eleven, asked by plaintiff."

This cause does not test the correctness of each instruction severally, but can only be sustained by showing all to be erroneous.

It is not, and could not be successfully, claimed that all these instructions are bad. There was consequently no available error in this regard.

Upon consideration of all the points presented by counsel, no just cause for reversal appears.

Judgment affirmed.

THE INDIANAPOLIS GAS CO. ET AL. v. SAMUEL D. TETERS ET AL.

(15 Indiana App. 475; 44 N. E. 549. Court of Appeals. June 12, 1896.)

[1]**No rent after well exhausted.** Under a lease for a term of years, "or so long as oil or gas is found on the premises," providing for the payment of a specified rental "each year in advance for every well from which gas is used off the premises," the lessee is liable only so long as he uses the gas; and upon the failure of the well, or if it becomes impracticable to use the gas therefrom, the lessee is released from all liability.

Appeal from Circuit Court, Hamilton county; S. H. Doyal, Special Judge.

Action by Samuel D. Teters and others against the Indianapolis Gas Company and others. There was judgment for plaintiffs and defendants appeal. Reversed.

KANE & KANE, for appellants.

SHIRTS & KILBOURNE, for appellees.

Ross, J. This action was brought by the appellees to recover rents alleged to be due under the terms of a lease executed by them to the appellant, Indianapolis Natural Gas Company, and by said company assigned to the appellant Indianapolis Gas Company. The cause was tried by the court, resulting in a finding and judgment in favor of the appellees in the sum of $111.50. The appellant Indianapolis Natural Gas Company, although notified of this appeal, has refused to join therein.

The complaint charges, in substance, that on the 5th day of December, 1889, the plaintiffs leased to the Indianapolis

[1]*Williams* v. *Gufty*, 18 M. R. 478.

Natural Gas Company, a corporation which was then engaged in the business of supplying gas to its patrons in the city of Indianapolis for use for fuel and light, for a term of five years, or so long as gas or oil was found upon the premises, the right to take gas or oil from certain real estate owned by them in Hamilton county, Indiana; that by the terms of said lease the said gas company agreed to pay, as rental for such privilege, the sum of $100 per year each year in advance, for every well from which gas was taken off said demised premises; that, pursuant to said lease, said company drilled a well and paid therefor until January 5, 1893, at which time an additional rental of $100 fell due; that, although it continued to use the well, it failed and refused to pay the rental for said year beginning January 5, 1893. It also appears, from the allegations of the complaint, that the appellant Indianapolis Gas Company purchased the rights of its co-defendant under said lease, adopted said contract as its own, and complied with the terms thereof until January 5, 1893, when it defaulted in the payment of rent.

To the complaint, the appellant Indianapolis Gas Company filed an answer in three paragraphs, the first of which was a general denial, and the second and third paragraphs pleaded special matter. Demurrers were sustained to the special answers, and these rulings are assigned as error. Appellant also assigns as error the overruling of its motion for a new trial.

The material question presented on this appeal, whether considered with reference to the pleadings or under the evidence, is as to the construction to be placed upon the terms of the contract or lease sued on.

On the part of the appellant it is contended that the lease provides that, if a well was drilled on the demised premises from which gas was taken, and the well should afterwards fail, the rent ceased: while the appellee's contention is that,

notwithstanding a well drilled might fail, yet the rental would continue.

It appears from the contract entered into that the appellees leased to the appellant, "for the term of five years, or so long as oil or gas is found upon the premises, all the oil or gas in and under" a certain 60 acres of land, which is particularly described. The appellant agreed to drill a well on the demised premises, commencing within one month from the date of the lease, or, in case it failed to drill a well, to pay appellees a rental of 50 cents per acre per annum, payable semi-annually in advance, until the well was drilled or the lease right reconveyed or forfeited. It is further provided that, "should gas be found second party [appellant] agrees to pay first party [appellees] one hundred dollars each year in advance for every well from which gas is used off the premises, commencing with the time gas is first transported off said premises and sold."

In the second and third paragraphs of its answer the appellant alleged that it drilled a well in compliance with the terms of said contract, and attached such well to its pipe line, and used the gas therefrom until January 1, 1893, when it turned off said gas from its pipe line, and that it has not used gas from said well since that time. Other facts are alleged showing the reason the well was shut off, namely, because of the water in the well, which, in the then condition of the well, prevented the gas from flowing into the pipe line. It also appears, from the answer, that the well was cut off, and the appellees notified thereof, before the commencement of the year for which the rental sued for accrued. That provision of the contract under which the appellees seek to recover provides that the appellant shall pay the appellees $100 per year for each well "from which gas is used off the premises." It is evident, from the provisions of the contract, that at the time the parties entered into the same they contemplated that the appellant might drill and use gas from

more than one well on said demised premises; so it was provided, not that appellant should have the right to take all the oil or gas found on the demised premises by the payment of an annual rental of $100 per year, but that it should pay that sum per year for each well from which gas was taken. Of course, if but one well was drilled from which gas was taken the rental was to be but $100 per year; but, if five wells were drilled, and gas taken from them, the rental would be $500 per year. This rental, whether one or more wells were drilled, was payable only so long as the appellant continued to take gas therefrom. If gas ceased to flow, or it became impracticable to take gas therefrom, the appellant had a right to cease to take gas, and to detach its line from the well, and its liability for the payment of the rental would cease. Under the allegations of the answers referred to, it appears that the appellant did cease to use gas from the well on account of the water in the well, which reduced the pressure so that, instead of gas flowing from the well, gas in its pipe line was forced into the well. When the gas ceased to flow from the well with sufficient force to enable appellant to utilize it, appellant was not bound to keep its line attached thereto, and to pay rental therefor.

Inasmuch as it is conceded by the counsel on both sides that the only question presented on this appeal is whether or not, by the terms of the contract sued on, the appellant was bound to pay the annual rental of $100 whether it took gas from the well or not, and that such question is presented by the answers to which demurrers were sustained, that is the only question we have considered.

Judgment reversed, with instructions to the court below to overrule the demurrers to the second and additional or third paragraphs of appellant's answer.

THE VIRGINIA COAL & IRON CO. v. MATHIAS KELLY, JR.

(93 Virginia 332; 24 S. E. 1020. Supreme Court of Appeals. July 2, 1896.)

[1]**Separate owners of surface and minerals not co-tenants.** Although a co-tenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance, and asserting it against his companions in interest, yet the owner of the surface of the land and the owner of the minerals under it, where each holds a separate and distinct title, are neither joint tenants, nor tenants in common. They are not the owners of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures. The title to the freehold of the one, either in the surface or the minerals, cannot be acquired by adverse possession of the other, and the purchase of the outstanding title by the one does not enure to the benefit of the other.

Facts of the case. C. conveyed to H. "all the coal, iron, stone, and other minerals, * * * and all the timber * * * of every kind and description, in, upon, and under the surface" of certain land, reserving the right to use and take timber from the land for firewood. By another deed of the same date, H. conveyed to C. the said tract, reserving all the "coal, iron ore, stone, and other minerals, timber," etc., granted to him by C. *Held*, that the respective deeds did not make the parties or their grantees co-tenants, but invested them with distinct freeholds

Void deed, cloud on title. A deed apparently valid, but in fact invalid as a conveyance of title, because dependent on a tax deed void on its face, constitutes a cloud on the legal title of the real owner.

Equity has jurisdiction to remove a cloud from the legal title of one who is in possession of the land, and is therefore prevented from bringing ejectment.

Appeal from Circuit Court, Wise county; W. T. Miller, Judge.

[1]There is no relation of privity between surface owners and mineral owners where the estates are severed. *Hutchinson* v. *Kline*, 199 Pa. 564; 49 Atl. 312.

The possession of one is not an adverse possession as against the other. *Catlin Co.* v. *Lloyd*, 176 Ill. 275; 52 N. E. 144. *Algonquin Co.* v. *Northern Co.* 162 Pa. 114; 29 Atl. 402. *Lulay* v. *Barnes*, 172 Pa. 331; 34 Atl. 52.

As to rights of the coal owner to the space it occupied after coal

Bill by the Virginia Coal & Iron Company against Mathias Kelly, Jr., to compel a conveyance of the minerals and timber on a tract of land, and to enforce payment for timber already cut. In his answer, defendant prayed that a certain deed under which complainant claimed be canceled, as constituting a cloud on defendant's title, and asked that such answer be treated as a cross bill. From a decree dismissing complainant's bill, but denying the relief sought by defendant in his cross bill, an appeal is taken. Modified.

E. M. FULTON, J. F. BULLITT, and R. A. AYERS, for appellant.

DUNCAN, MATHEWS & MAYNOR, for appellee.

RILEY, J. In 1855 a patent was issued by the Commonwealth to one Henry H. Horton for 134 acres of land on Pigeon creek, and in November, 1863, he conveyed the land to Lawson W. Vance, who took and held possession thereof until his death. He left a widow and two infant sons as his heirs at law. They remained a year or so on the land, when his widow removed to the West, taking the children with her, and leaving the land in charge of J. M. Clarkston, who, in consideration of the rent to be received therefrom and certain property left with him for the purpose, was to pay taxes on the land.

Clarkston never paid any of the taxes, but allowed the land to be returned delinquent. At the sale made thereof for taxes in 1873 it was bought by M. V. Kilbourn, from whom Clarkston redeemed it in 1875, by paying the back taxes, and the required 10 per cent. interest thereon, and took an

worked out see *Lillibridge* v. *Lackawanna Co.* 17 M. R. 412. *Armstrong* v. *Auen*, 17 M. R. 392.

Construction of 100 year lease of coal with reservations, holding it to be a complete severance. *Plummer* v. *Hillside Co.* 104 Fed. 208.

assignment from Kilbourn of his purchase. In 1881, Clarkston had the land surveyed, and procured a deed therefor from the clerk of the court on May 10, 1881.

This land lies within the boundaries of the patent of Taylor, Fields and Johnson for 62,000 acres; and E. K. Hyndman, having become the owner of 48,200 acres thereof, which included the 134 acres, in October, 1881, made a compromise with Clarkston, whereby the latter, for the price of 50 cents per acre, conveyed by deed dated October 14, 1881, to Hyndman, "all the coal, iron, stone, and other minerals of whatever name, nature, and description, and all of the timber trees and other trees of every kind and description, in, upon, and under the surface" of the said land, but reserved the right "to use and take timber from any part of said land for firewood, rails, and other farm purposes, to be used upon said premises," Clarkston warranted the lands so conveyed against the claim of Vance and all persons claiming under him. By deed bearing date the same day, Hyndman conveyed to Clarkston the said tract of 134 acres, but excepted and reserved all the "coal, iron ore, stone, and other minerals, timber," etc., granted and conveyed to him by Clarkston in his deed.

Subsequently, on June 14, 1884, Clarkston sold and conveyed to Mathias Kelly, for the sum of $300, "all of the surface right" of the said land as the same was conveyed to him by Hyndman.

In 1887, Hamilton Vance, one of the heirs of Lawson W. Vance, returned to this state, and made claim to Clarkston for the land. Negotiations took place between Vance, Clarkston, and Kelly, which resulted in the payment by Kelly to the widow and heirs of Lawson W. Vance of the sum of $150 for the land, and the conveyance of the same by them to him on February 28, 1887. Clarkston agreed to refund to Kelly $60 of the purchase money he had received, and gave a deed of trust on his home tract of land to secure its payment.

Clarkston never paid any part of the $60, nor was the deed of trust ever enforced. The Virginia Coal & Iron Company bought from Hyndman his interest in the 48,200 acres referred to, which included the minerals and timber in the tract of 134 acres, and the same was conveyed to it on May 6, 1882.

Kelly having commenced to cut a large number of poplar trees standing on the land, the appellant, in 1893, filed its bill to compel him to convey to it all the minerals and timber on the land, and to pay for the trees which he had cut. Kelly filed his answer in which he admitted that he had sold the trees as charged in the bill, but averred that ever since February 28, 1887, the date of the deed from the heirs of Vance, he had claimed as his own in fee the entire land, including everything on it or under it, and denied any right of the complainant thereto, or compensation for the trees so sold.

The complainant based its claim to have Kelly convey to it the minerals and timber on the land, and to pay for the trees, upon several grounds.

First, That Clarkston paid the money, or a part of it, for the conveyance from the heirs of Vance to Kelly, and that a trust thereby resulted in favor of Clarkston, which, by reason of his warranty, inured to the benefit of the complainant as the grantee of Hyndman. The evidence, however, shows that Kelly paid the entire amount to the heirs of Vance and that Clarkston paid no part of it. There was, therefore, nothing to create a resulting trust in favor of Clarkston.

It was also argued that the acquisition by Kelly of the true title from the Vance heirs, with knowledge of the conveyance by Clarkston of the minerals and timber to Hyndman, and the claim of the complainant thereto as the grantee of Hyndman, converted Kelly into a constructive trustee of the title to the minerals for the benefit of the complainant; but, without following the learned counsel for the appellant in his ingenious argument to establish such contention, it is sufficient

to say that the claim of a constructive trust is likewise not sustained.

The main ground relied upon by the complainant was that Kelly, as the owner of the surface of the land under the conveyance from Clarkston, and the Virginia Coal & Iron Company, as the owner of the minerals and the timber, were tenants in common; and that, such being their relation to each other, the purchase of the outstanding title from the Vance heirs by Kelly inured to the benefit of his co-tenant, the complainant.

The general doctrine on this subject is thus stated by an eminent text writer.

"A co-tenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance and asserting it against his companions in interest. The purchase is, notwithstanding his designs to the contrary, for the common benefit of all the co-tenants. The legal title acquired by him is held in trust for the others, if they choose, within a reasonable time, to claim the benefit of the purchase, by contributing, or offering to contribute, their proportion of the purchase money." Freem. Co-Ten. § 154.

It is not questioned that this is the established doctrine in Virginia. *Buchanan* v. *King's Heirs,* 22 Grat. 414; *Forrer* v. *Forrer's Ex'rs,* 29 Grat. 134; and *Pillow* v. *Improvement Co.,* 92 Va. 144; 23 S. E. 32. But are Kelly, as the owner of the surface of the land, and the Virginia Coal & Iron Company, as the owner of the minerals and the timber in and upon the same, co-tenants?

Land includes everything belonging or attached to it. It includes the surface and whatever is contained within or beneath the surface. It includes the minerals buried in its depths or which crop out of its surface, and the woods and trees growing upon it. 2 Bl. Comm. 17-19; 2 Minor, Inst. 4; and *Stuart* v. *Pennis,* 91 Va. 688, 22 S. E. 509.

And it is now a familiar doctrine that in these various sub-

jects separate and distinct freeholds may be created and owned by different persons by separate and independent titles. One may own the surface, another the coal, and another still some other mineral, all within the same parcel of land. Each may have a fee or less estate in his respective part. 1 Washb. Real Prop. 12; 2 Washb. Real Prop. 345; *Caldwell* v. *Fulton,* 31 Pa. St. 475; *Caldwell* v. *Copeland,* 37 Pa. St. 427; *Armstrong* v. *Caldwell,* 53 Pa. St. 287; *Williams* v. *Gibson,* 84 Ala. 228, 4 South. 350; *Lillibridge* v. *Coal Co.,* 143 Pa. St. 293, 22 Atl. 1035; 24 Am. St. Rep. 544, and the note thereto; *Lee* v. *Bumgardner,* 86 Va. 315, 10 S. E. 3; *Barksdale* v. *Parker's Adm'rs,* 87 Va. 141, 12 S. E. 344.

Said Strong, J., in *Caldwell* v. *Fulton, supra:* "Coal and minerals in place are land. It is no longer to be doubted that they are subject to conveyance as such. Nothing is more common in Pennsylvania than that the surface right should be in one man and the mineral right in another. It is not denied, in such a case, that both are land owners, both holders of a corporeal hereditament."

In *Caldwell* v. *Copeland, supra,* Woodward, J., said: "There is no more reason why mines in another's land, whether opened or unopened, may not be held by a deed, duly acknowledged and recorded, than why land in its most ordinary signification may not be so held. In other words, mines are land, and subject to the same laws of possession and conveyance."

"There is no more reason for considering the coal an incorporeal hereditament because it has not been opened, than there is for considering the soil such because it has not been plowed." Green, J., in *Lillibridge* v. *Coal Co., supra.*

The language of the respective deeds of Clarkston to Hyndman and from Hyndman to Clarkston leaves no room for question that there was an absolute sale and conveyance in fee by Clarkston to Hyndman of all the minerals and timber in and upon the lands described in the said deeds, and by the

deed from Hyndman to Clarkston the investment in Clarkston of the surface in fee with the right to take and use the timber for farm purposes. There was a complete severance of the title to the minerals and timber from the title to the surface, and the creation of separate and distinct freeholds. This was done on October 14, 1881, while the purchase by Kelly of the outstanding title from the heirs of Vance and their conveyance to him of the land did not take place until February 28, 1887.

The Virginia Coal & Iron Company acquired the title of Hyndman to the minerals and timber, and Kelly acquired the title of Clarkston to the surface. They became the owners of estates in fee in distinct and separate parts of the land, as much so as if they had acquired title to separate portions of a certain parcel of land. "The division was as complete as if it had been made by lines on the surface. Their respective estates were the subjects of independent taxation." Code, Va. § 472. They were not the owners of undivided interests in the same subject at the time Kelly bought in the Vance title, but were the owners of distinct subjects of entirely different natures. They did not own interests or shares in the same freehold, but owned separate freeholds, which were separately the subjects of possession, enjoyment, and incumbrance. Title to the freehold of the one, either in the surface or in the minerals, could not be acquired by adverse possession of the other. 2 Washb. Real Prop. 345; *Caldwell* v. *Copeland, supra;* and *Armstrong* v. *Caldwell, supra.* The Virginia Coal & Iron Company alone owned the minerals and timber; Kelly alone owned the surface. There was no community of interest between them. Hence it has been held that the owner of the surface of a parcel of land and the owner of the minerals under the same are not joint tenants nor tenants in common. *Neill* v. *Lacy,* 110 Pa. St. 294, 1 Atl. 325; and *Powell* v. *Lantzy* (Pa.) 34 Atl. Rep. 450.

In *Powell* v. *Lantzy, supra,* the facts were these: One

Flinn, being the owner of a tract of land, conveyed away the same to Jose, but excepted and reserved the coal and minerals and conveyed them to Powell. Jose afterwards conveyed the surface to Lantzy. Subsequently the land was sold for taxes which had been assessed before the severance of the title to the surface from that to the minerals, and at the sale Lantzy became the purchaser of the whole. An action of ejectment was brought by Powell against Lantzy to recover the coal and minerals. The regularity of the sale for the taxes was not questioned, but the validity of the title depended, said the court, "upon the question whether Lantzy was forbidden by any rule of legal policy to acquire a title at a sale for taxes charged against his own land, and whether the title acquired, if otherwise good, was affected by any equity growing out of the relation which the owner of the surface and the owner of the minerals bore to each other." Fell, J., speaking for the court, said: "The owner of mineral rights holding by virtue of a reservation in a deed is neither a tenant in common nor a joint tenant with the owner of the surface. Each has a separate estate."

The court held in that case that "no relation of confidence existed between them which gave rise to a duty which equity will enforce through the medium of a trust;" and such is our conclusion in the case at bar.

The appellee, in his answer, averred that the deed from Clarkston to Hyndman for the minerals and timber was a cloud upon his title, which he prayed the court to remove by cancelling and annulling the deed, and to this end he asked that his answer be treated as a cross bill. The court so treated it, but refused to grant the relief prayed for.

The jurisdiction of courts of equity to remove clouds from title where the party complaining has no adequate remedy at law is well settled. This is particularly the case where he is the owner of the legal title, and is in possession of the land upon the title to which the cloud rests. *Otey* v. *Stuart,* 91

Va. 714, 22 S. E. 513; *Stearns* v. *Harman,* 80 Va. 48; *Carroll* v. *Brown,* 28 Grat. 791; *Hale* v. *Penn's Heirs,* 25 Grat. 261; and *Yancey* v. *Hopkins,* 1 Munf. 419.

In this case the appellee, by virtue of his deed from the heirs of Vance, is the owner of the superior legal title, extending back to the Commonwealth, and is in possession of the land. The deed from Clarkston to Hyndman, under which the appellant claims, while dependent for validity as a conveyance of the title on the tax deed to Clarkston, which is void on its face, appears to be valid, although in reality it is invalid for such purpose. It cannot be denied that it is a cloud upon the title of the appellee, and materially impairs, if it does not destroy, the market value of the land. No one would desire to buy it, or be willing to lend money upon it as a security, with such a cloud resting upon the title. Being prevented by his possession from resorting to the action of ejectment as a remedy, his only relief is in a court of equity; and he is clearly within the rule under which equity interferes. This relief the court below should have granted by compelling the appellant to release or convey to the appellee all right to the minerals and timber which it claims under the deed from Clarkston to Hyndman.

We are therefore of opinion that the circuit court did not err in dismissing the bill of the plaintiff with costs, but that it did err in refusing to remove the cloud upon the title of the appellee. A proper decree, in accordance with this conclusion, will be entered by this court.

Amended and affirmed.

JOHN KLEPPNER v. D. P. LEMON.

(173 Pennsylvania 502; 35 Atl. 109. Supreme Court. July 15, 1896.)

[1]**Implied covenant to get all oil possible though not contracted for.** A lessee was bound to sink one well which he did. But there were producing wells on two sides of the demised tract. The court hold that it is his duty to sink more wells to prevent the wells on the adjoining tracts from draining the oil under the demised tract. If he refuse the court sets him apart the territory which in their opinion belongs to the one well which he has sunk and compels him to surrender the remaining territory to the lessor. MITCHELL, J. dissents.

Appeal from Court of Common Pleas, Allegheny county.

Bill by John Kleppner against D. P. Lemon. From a decree for plaintiff, defendant appeals. Affirmed.

D. F. PATTERSON, for appellant.

M. A. WOODWARD and W. G. GUILER, for appellee.

WILLIAMS, J. This is, in substance, though not in form, a bill for specific execution of a contract. The defendant denies that the contract set out in the bill as the basis of the relief asked imposes any obligation, express or implied, upon him to do that which the plaintiff demands of him. The case must therefore depend upon the proper interpretation of the contract, aided by the necessities and usages of the business to which it relates. The plaintiff is the owner of a lot of land containing 7½ acres. The adjoining lands—at least, on two sides—were being developed as oil lands by the defendant. He applied to the plaintiff for and obtained a lease for oil and gas, covering his tract. This lay in a triangular

[1] *See Kleppner* v. *Lemon*, 198 Pa. 581; 21 M. R.—and note for the continuation of this litigation.

shape, with its base, about 750 feet long, on land of Stewart; its perpendicular resting against the tract known as the "Stotler Tract;" and its hypothenuse, about 1,000 feet long, abutting on the right of way of a railroad. The lease confers on the lessee "the exclusive right of drilling and operating for petroleum and gas" on the plaintiff's land. If oil is found, the lessee covenants to pay a royalty of one-eighth of all oil produced, free of cost or expense, to the lessor. If gas is found in sufficient quantity to justify marketing it, he is to pay the sum of $500 per annum for each well. The right to divide the leasehold, and to sublet the parts into which it is divided, for oil purposes, is distinctly reserved by the lessee. There is no distinct covenant for putting down wells on the land, except that which relates to the first or experimental well, which was to determine the value of the land for oil purposes. But, in a lease for oil purposes, a stipulation that other wells shall be put down, where the land is shown to be valuable for oil by the production of the first or test well, is not indispensable. The nature of oil and gas, the pressure of the superincumbent rocks, and the vagrant habit of both fluids under the influence of this pressure, enter into the contemplation of both parties to such an agreement. *McKnight* v. *Gas Co.*, 146 Pa. St. 185, 23 Atl. 164. It is an implied condition of every lease of land for the production of oil therefrom that, when the existence of oil in paying quantities is made apparent, the lessee shall put down so many wells as may be reasonably necessary to secure the oil, for the common advantage of both lessor and lessee. In determining when and where such wells shall be located, regard must be had to the operations on adjoining lands, and to the well-known fact that a well will drain a territory of much larger extent when the sand rock in which the oil or gas is found is of coarse and loose texture than when it is of fine grain and compact character. Whatever ordinary knowledge and care would dictate as the proper thing to be

done for the interest of both lessor and lessee, under any given circumstances, is that which the law requires to be done as an implied stipulation of the contract. If this was not so held, it would be practicable to defeat the very purposes of the contract, and to drain from the land of the lessor the oil underlying it, and yield him nothing in return. The reason why this doctrine is modified in its application to gas territory is plainly stated in *McKnight* v. *Gas Co., supra.* It is the difference in the manner of gathering and utilizing the product in gas and oil wells.

Turning now to the findings of fact made by the learned judge of the court below, we learn that the defendant has put down one well on the plaintiff's land, about midway across the base line of the triangle, and very close to the line of the Stewart. The rock there is very compact, and the well yields but four or five barrels per day. He has put down two wells on the Garlach, finding a loose rock, and good wells. He has finished one large well on the Stotler, quite near to the top of the triangle, and in a very porous rock. He has another in progress, on the same tract, not far from the base end of the perpendicular side of plaintiff's land. These wells show with a reasonable degree of certainty that the upper half of the Kleppner lot is over a coarse, porous rock, and is capable of furnishing one or more good wells. The location of the other wells referred to shows that this end of the Kleppner lot will, in two or three years, be completely drained by them; other persons will secure the royalties for his oil, and he will receive nothing whatever for the oil under the only valuable portion of his land. The findings further show that it is the expressed purpose of the defendant to secure Kleppner's oil through his wells on the Garlach and Stotler tracts of land. From the terms and purposes of the lease; from the nature and usages of the business to which it relates, and from the findings of fact to which we have referred, we draw the following conclusions of law:

First, The lease contemplates the production of the oil underlying the Kleppner lot by means of operations conducted on its surface.

Second, The number and location of the wells necessary to carry out the purposes of the contract is a subject belonging primarily to the lessee.

Third, In disposing of this question, the lessee is bound to take into consideration the fact that his lessor is the owner of the oil, and to arrange and conduct his efforts to bring it to the surface in such manner as shall best protect the interests of both parties to the contract.

Fourth, He is not bound to put down more wells than are reasonably necessary to obtain the oil of his lessor, nor to put down wells that will not be able to produce oil sufficient to justify the expenditure.

Fifth, But that the oil may be obtained in time through other wells, on the lands of other owners, is not enough to excuse the lessee from his implied undertaking to operate the land for the best interests of both owner and operator.

In the main, the decree appealed from is justified by these legal conclusions. The operator has the right, as we have seen, to locate the well he is to put down; but we think the court below was justified in holding that the evidence afforded good ground for the belief that a paying well could be found on the upper end of the triangle, if so located as fairly to command the oil underlying the land. The defendant may think differently. If so, he may surrender all of the land covered by his lease, except that naturally tributary to the well near the Stewart line. The conclusion that this well cannot reach and bring to the surface the oil in the loose rock under the other end of the plaintiff's land, but that the wells of the defendant, now down and in progress, on the Garlach and the Stotler lands, will do so, seems fully justified by the evidence. It is not found as a fact that these wells do now reach the plaintiff's so as to draw from it. It is the fact

that they may do so that gives the plaintiff his claim to present consideration. As bearing upon this general subject, the attention of the profession is called to *James* v. *Oil Co.*, 1 Penny. 242, and *Blair* v. *Peck*, Id. 247,—cases which are not to be found in the authorized reports. We affirm the decree, with slight modifications, as follows:

Upon consideration of the appeal from the decree of the court of common pleas No. 2 of Allegheny county, made on the 23d of December, 1895, it is ordered, adjudged, and decreed that it is the duty of the defendant to proceed at once to drill and operate another oil well on the land of the plaintiff, described in the bill and in the lease thereto attached, near the northern end of said piece of land.

It is further ordered that if the defendant does not, within 10 days after notice of this decree, file in this case a declaration setting forth that he will put down another well on said land, near the north end thereof, and begin the same within 20 days thereafter, and prosecute the same to completion with all reasonable diligence and in good faith, his leasehold estate in said land shall be deemed to be abandoned, except as to the well known as "Kleppner No. 1," and a space of 300 feet around it on all sides, and the right of way, etc., incident thereto.

It is further ordered that the defendant be enjoined, from and after 10 days after notice of this decree, from exercising any authority or control over any portion of said land, except that now designated as appurtenant to Kleppner well No. 1, and that he retire from and surrender the same to the plaintiff unless the notice hereinafter provided for be filed within the said 10 days. *The record is now remitted, that the court below may give such further orders as may be necessary to give full effect to above decree. The costs to be paid by the appellant.*

MITCHELL, J. (dissenting). A lessee who covenants to pay royalty on production is undoubtedly bound, in good faith, to make proper effort to develop the land. But while the interests of the parties are the same, in getting the largest production, yet in some respects they differ. The lessee has to bear the cost of putting down wells, and his interest is to proceed carefully, with due regard to expense and probable returns, while the lessor's interest is to have search and experiment, without regard to present cost. The decision in regard to such matters belongs primarily to the lessee. It is a proper subject for agreement, and when the parties have agreed what shall be done, their rights are not subject to the judgment of any court to fix a different standard. If the parties to the present controversy had expressly stipulated that one well should be sufficient for the whole tract, no court would venture to enlarge the test by directing another to be put down at the lessee's expense; yet the covenant of the lease amounts to just that, as I understand the learned court below to admit. I would reverse this judgment, as a flagrant violation of the liberty and sanctity of contracts by raising a purely factitious equity to enable the complainant now to make a better bargain, at the defendant's expense, than he chose or was able to make for himself at the time.

ALTOONA QUICKSILVER MINING CO. v. INTEGRAL QUICKSILVER MINING CO.

(114 California 100; 45 Pac. 1047. Supreme Court. August 20, 1896.)

[1]**The application and the suit independent proceedings.** An action in support of an adverse claim is tried in a State Court as a suit brought under the laws of the State and the result of the action as affecting the status of the parties in the land office has no bearing upon the pleadings, practice or jurisdiction.

[2]**That suit was not brought within the thirty days,** as required by Act of Congress, is no defense to the action, unless the effect of the delay was to defeat plaintiff's right of possession on the date when suit was brought.

[3]**The court takes judicial notice** without averment or proof, of how long after a certain event an action pending before it was commenced, the date of such event being averred and admitted in the action.

The citizenship of the locator may be proved without necessity of its having been averred in the complaint.

[4]**Adverse possession for the statutory limitation period** prior to the inception of the adverse title, of itself makes title equivalent to location.

[5]**The services of a watchman** will count as annual labor if his services were necessary to protect improvements, otherwise if he was placed there merely to warn prospectors off the claim.

Whether work done on one of a group of claims was for the benefit of the claims in controversy is a question of fact for the jury.

[6]**Group claims need not necessarily be contiguous** to allow work on one to count for another.

---

[1]Compare *Hunt* v. *Eureka Gulch Co.* 17 M. R. 340. The text case takes the extreme position that the court take no notice of the land office proceedings. The courts of all other states recognize the interdependence of the two proceedings. See Lindley 2d Ed. § 754.

[2]The defense that the adverse was not filed, or the suit brought within the statutory period, must be specially pleaded. *Pennsylvania Co.* v. *Bales* (Colo. App.) 70 Pac. 444. *Providence Co.* v. *Marks*, (Ariz.) 60 Pac. 938. *Marshall Co.* v. *Kirtley*, 16 M. R. 6.

[3]*Pennsylvania Co.* v. *Bales*, *supra.*

[4]*Glacier Mt. Co.* v. *Willis*, 17 M. R. 127.

[5]*Lockhart* v. *Rollins*, 16 M. R. 16. *Tripp* v. *Dunphy*, 28 L. D. 14.

[6]*Contra. Gird* v. *California Co.* 18 M. R. 45. *Royston* v. *Miller*, 18 M. R. 418.

[1]A general verdict is sufficient in an adverse claim suit and its availability for use in the land office is not a matter of concern to the court.

In banc. Appeal from Superior Court, Trinity county; T. E. Jones, Judge.

Action by the Altoona Quicksilver Mining Company against the Integral Quicksilver Mining Company. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Affirmed.

CROSS, HALL, FORD & KELLY and T. W. H. SHANAHAN, for appellant.

REDDY, CAMPBELL & METSON and D. G. REID, for respondent.

TEMPLE, J. This is an action to quiet title to certain mining ground in the county of Trinity, in which the court and the parties have encountered many difficulties because, misled by the case of *Anthony* v. *Jillson,* 83 Cal. 296, 23 Pac. 419, they have persisted in treating it as a contest in the United States land office for the right to enter certain mineral lands. In the case referred to, counsel and the court so speak of the controversy, but no question in relation to the character of the proceeding was before the court. Congress could not impose upon the state courts the duty or the labor of determining for the land office who is entitled to purchase from the United States, and it has not attempted to do so. Nothing is referred to the state courts for trial. But the contestant is required to test his right to the possession of the mining ground in the local courts. This he must do, if in a state court, by some proceeding authorized by the laws of the state. If we could suppose that there was no mode provided in the

[1]*Bennett* v. *Harkrader,* 18 M. R. 224.

state laws for doing this—no action of which the state courts would have jurisdiction in which this could be done—the act of congress would not confer the jurisdiction which was lacking. This is not an action brought under section 2326 of the Revised Statutes of the United States to determine which of the parties is best entitled to purchase from the United States, but only an ordinary action to quiet title. The proceedings in the land office of the United States are utterly immaterial here, unless they tend to show title or right of possession in one of the parties.

Unless, therefore, defendant was prepared to maintain the proposition that if plaintiff did not commence his suit within 30 days from the time he filed his claim in the land office he not only lost his claim to a patent, but also his right of possession, it mattered not whether the suit was commenced within 30 days. This, if the position be correct, would constitute a forfeiture, and the defendant would be required to plead and prove it as a defense.

Under the state laws either party may bring an action to determine an adverse claim, but the jurisdiction and the procedure governing the action depend entirely upon our state constitution and laws. This action seems well adapted to the object sought to be accomplished by the congressional law, for in it the rights of the parties are wholly determined by the acts of congress, and involve the same questions as to the relative rights of the parties which the officers of the land office would otherwise have been required to pass upon. But it does not matter to the state court whether its judgment can be made available in the land office or not. This view was taken by this court in *Quigley* v. *Gillett*, 101 Cal. 462, 35 Pac. 1041, where it was said: "The action was brought 'to determine the question of the right of possession' of certain mining land, and that was the only question involved. The court had nothing to do with the proceedings in the land

office, and no power to determine as to their regularity or irregularity, sufficiency or insufficiency."

To the same effect is *420 M. Co.* v. *Bullion M. Co.*, 9 Nev. 240. It was there held that the act of Congress simply required the contestant to bring such action as was authorized by the laws of the state to determine the right of possession, and that such action, when brought, would be governed and determined by the practice and rules of pleading there prevailing, irrespective of the act of Congress requiring the suit to be brought.

The rights of the parties will be entirely determined by the laws of the United States granting the right to enter upon the mineral lands, and to extract metals therefrom, and to acquire title thereto, but the suit must be tried in every respect as though no contest was pending in the land office of the United States in regard to the right to purchase the same. The court would be at liberty to order a special verdict if that was desired by the parties, because it would be more serviceable in the contest, for that may be done in any case, and such contingency is provided for in our practice.

If these views be correct, it was, of course, error to instruct the jury to find against plaintiff on the ground that it did not appear that the suit was begun within 30 days after plaintiff filed its claim in the land office. For another reason I think it was error. The time of the filing of plaintiff's adverse claim in the land office at Redding was averred and admitted. The court knew judicially when the action was commenced, and therefore that the suit was commenced within 30 days. It is not necessary either to aver or prove facts which are within the judicial knowledge of the court.

The instruction was a simple direction to the jury to find a verdict against the plaintiff. With the reason given for so instructing, the jury had nothing to do. This direction the jury disobeyed.

Why the court proceeded to give other instructions, elabo-

rately considering the law applicable to the facts of the case, after this explicit direction, it is impossible to conceive. It was confusing to the jury, for, if they were to obey the explicit direction, they had nothing to do with the other instructions, at least so far as plaintiff's case is concerned. Furthermore, the court, by subsequent instructions, expressly submitted to the jury the whole case, including plaintiff's claim, and even wrote out and handed to them the form of the verdict which they should render if they found for the plaintiff. In various instructions it submitted to the jury the question as to whether plaintiff or its grantors had complied with the law in regard to the location and working the mine, and as to its claim of right by actual adverse possession. The jury found for the plaintiff. In so doing they disobeyed the express direction to find against the plaintiff, but they obeyed the other direction to consider and pass upon the rights of the plaintiff, and to find according to the facts and principles of law declared by the court. The judge, in considering the case on motion for a new trial, was convinced that he had erred in directing the jury to find against the plaintiff, but thought, nevertheless, he was bound to grant a new trial on the authority of *Emerson* v. *Santa Clara Co.*, 40 Cal. 543, in which it was held that a verdict against the instruction of the court is a verdict against law. This case is not within the reason of that case. Here the instructions were, in effect, contradictory, and the verdict, while opposed to one instruction, is warranted by others.

But, as the order granting a new trial must be affirmed for other reasons, this point need not be further discussed. This plaintiff relied in part upon a location of the land in controversy by one John A. Lytle. To show that Lytle was a competent person under the laws of the United States to make such location, it was incumbent upon plaintiff to show that Lytle was a citizen of the United States, or had filed his statement declaring his intention to become such. The plaintiff put

~~in competent~~ and ~~sufficient evidence to~~ show that Lytle was a natural-born citizen of the United States, but it was then stricken out on motion of defendant on the ground that it had not been pleaded. This ruling was very far reaching. By section 2319, mineral lands of the United States are open for exploration, occupation, and location to citizens and those who have declared their intention to become such, only. Under this ruling plaintiff could derive no title through the location or occupation of Lytle, because this fact was not averred. I do not think in an action to quiet title a plaintiff is bound to show the source of his title in his complaint, but to prove his right under that location it was incumbent upon plaintiff to prove that Lytle was competent under the laws of the United States to take, hold, and locate mineral land.

The court instructed the jury to the effect that one who has not located mineral land in the mode prescribed by law and the custom of miners may yet acquire a right thereto by holding and working the same for five years "in the absence of an adverse claim." Defendant's counsel contend that section 2332—the section referred to—only provides that a patent shall issue in such case when there is no adverse claim, but, where any one has located the same land according to law and the custom of miners, then mere possession gives no right whatever.

The act of Congress has been otherwise construed in various cases. *420 M. Co.* v. *Bullion M. Co.*, 9 Nev. 240; Id., 3 Sawy. 634, Fed. Cas. No. 4,989. Judge Sawyer says that the laws of the state constitute a part of the laws by which a mining right is determined. It must therefore follow that, where such possession has continued for five years before the adverse right exists, it is equivalent to a location under the laws of Congress. See, also, *Harris* v. *Mining Co.*, 8 Fed. 863; *Belk* v. *Meagher*, 104 U. S. 279; *Anthony* v. *Jillson*, 83 Cal. 302, 23 Pac. 419.

But, while the instructions upon that subject state the law

correctly, nevertheless I think the order must be affirmed. As already stated, the plaintiff also relied upon the location made by Lytle, and much testimony was taken upon that subject, and at the request of plaintiff the jury were told that if they found that plaintiff and its grantors had held the claim for 18 years, basing their right upon the location made by Lytle, then every reasonable presumption should be indulged in favor of the validity of such alleged location.

In connection with this they were also told of the two modes provided by Congress for acquiring title to mineral lands. This was in effect telling them that, if Lytle made the location, it could be relied upon by plaintiff as a source of title. But they were not only told in another instruction that they must find against plaintiff, but the court had stricken out all evidence of the citizenship of Lytle. Therefore, as the case then stood, there was no proof of a valid location made by Lytle. We cannot say that the jury did not base their verdict upon such alleged location, or that they found that plaintiff had held, worked, and possessed the claim for five years. We cannot say, therefore, that the instructon was not injurious.

The defendant also complains of the instruction of the court in regard to the work required upon a mine in order to hold the same. The jury were told that it might consist in digging, etc., "or, if the mine be idle, it may consist of the services of a watchman or custodian in looking after the property and taking care of the same."

To constitute a general rule, this would require some qualification. If this sort of care was necessary to preserve tunnels, buildings, or any structures erected to work the mine, and which would be necessary in case work were resumed, I see no reason why it would not constitute work upon the mine as much as the erection of such structures in the first instance would. But if there was only the naked claim to be looked after, and a watchman were placed there merely to

warn prospectors, and thus prevent a relocation, it would not be labor upon the mine in the sense of the statute. As applied to the facts of this case, the instruction was not injurious, for it was not disputed that there were reduction works, houses and barns, as well as tunnels and pits, to be looked after.

The buildings were upon the claim in dispute, but plaintiff claims two other locations, which are not involved in this controversy. Most, if not all, the earthworks from which ore was extracted were on the other two claims. Defendant contends that the work was not for the purpose of working the claim in controversy, nor adapted to that purpose. This raised a question of fact to be determined by the jury. The fact, however, if so it was, that the claims did not actually touch each other, and there was a narrow strip of land between the locations, would not determine the question. Mines may be conceived of as so situated that the same work may be, and appear to be, expended in opening or developing both mines, although they are not actually contiguous. On the other hand, not all expenditures made with a view to working a mine would be considered work expended upon a mine under this rule; for instance, work done at a distance from the mine in the construction of a mill.

The form of the verdict was sufficient. Whether it would answer the purpose of the parties in the land office does not concern us. It complies with all the requirements of our laws and practice.

The order is affirmed.

MCFARLAND, J.; HENSHAW, J.; HARRISON, J.; VAN FLEET, J. and BEATTY, C. J., concurred.

ROYSTON v. MILLER ET AL.

(76 Federal 50. Circuit Court, District of Nevada. August 24, 1896.)

[1]**Annual labor on group. Claims must touch.** The provisions of Rev. St. § 2324, authorizing the necessary work to be done on any one of the several claims held in common, applies only when such claims are contiguous.

[2]**Estoppel against co-owner reporting work done.** A co-owner of several mining claims, who undertakes to do the work necessary to hold such claims, and reports to his co-owners that he has done such work, cannot acquire any interest therein as against his co-owners because of the failure to do such work.

No forfeiture in 1893. No vested interest in penalty. Act Nov. 3, 1893 provided that Rev. St. § 2324, as to the doing of labor or making of improvements on a mining claim, should be suspended for the year 1893, and that any failure in that regard should not cause a forfeiture. *Held*, that a co-owner, who had done the necessary work for that year, had no vested right to contribution from his co-owner or to forfeiture in lieu of contribution.

Ignorance by a party to an instrument of the contents thereof does not relieve him from its legal effect, in the absence of fraud or misrepresentations.

Partition—Equitable title. Where one co-owner of property brings suit for partition, it is immaterial whether he has a legal or equitable title, and in either case he is entitled to the same relief.

As between a sale and a partition, the courts will favor the latter.

DAVID S. TRUMAN, for complainant.

TRENMOR COFFIN, for respondents.

HAWLEY, District Judge (orally). This is a suit in equity for an accounting and for partition of a group of mining claims known as the "Kingston Mines," situated in Victorine mining district, Lander county, Nevada, and of the "Irvine Tunnel," run for the purpose of prospecting and

[1]*Gird* v. *California Co.* 18 M. R. 45. Contra, *Altoona Co.* v. *Integral Co.* 18 M. R. 410.

[2]*Yarwood* v. *Johnson*, 29 Wash. 643; 70 Pac. 123. *Doherty* v. *Morris*, 17 Colo. 105; 28 Pac. 85. *Saunders* v. *Mackey*, 5 Mont. 523; 6 Pac. 361.

developing said mining claims. This group consists of four different claims, known as the "Provider," the "Morse," the "California," and the "Chicago." The first three are contiguous. The Chicago is separated from them by the "Victorine," a patented mining claim owned by other parties. Prior to October, 1891, George E. Spencer and J. C. Irvine were co-owners of the property involved in this suit. During that month, Spencer conveyed to his wife, Mrs. William Loring Spencer, his entire interest in the property. On September 1, 1893, Mrs. Spencer conveyed her interest therein to complainant. The interest of defendant Miller is in the nature of a trustee for the defendant Irvine.

There is a controversy between the parties as to their respective interests in a portion of said property, and also upon the question as to whether the property can be divided without material injury. But the defendants contend that the grantors of complainant forfeited all their rights to the property by a failure on their part to perform or contribute their proportion of the assessment work upon said claims for the year 1893, and especially of the Chicago claim for the year 1892. This question of alleged forfeiture will be first considered. The evidence shows that the co-owners, from the year 1888, when they commenced to run the Irvine tunnel, up to 1892, performed more than sufficient work to hold all the claims each year; that during all this time, up to the time Spencer disposed of his interest, Irvine was the agent of Mr. Spencer in performing the work and caring for the property; and that Spencer relied upon and trusted him to properly do the necessary amount of assessment work upon each of said claims. In the year 1892, more than $1,000 worth of work and labor was done and performed on the Irvine tunnel; and this was done, as in previous years, for the express purpose of holding all of the claims,—the Chicago as well as the three others that were contiguous to each other. The relations existing between Spencer and

Irvine, when the work was done upon the tunnel, prior to August, 1892, were friendly and fiduciary in their character. During that month, for reasons unnecessary to state, the friendly relations ceased; and thereafter Irvine, on his own account performed the necessary amount of work on the Chicago claim to hold it for the year 1892. In 1893, Irvine did sufficient work on the Irvine tunnel, prior to November 3d, to hold all of said claims. Mrs. Spencer, who had succeeded to the interests of her husband in the property, had employed a man to work jointly with her son to do her proportion of the assessment work for that year. But, at the time the work was done by Irvine she was engaged in attending to the crops on a ranch in the vicinity of the mines, and expressed her desire not to commence the assessment work on the tunnel until the work then being done upon the ranch was finished, and which would still give plenty of time to perform the assessment work for that year. In the meantime (after Irvine had completed the work), she learned of the passage of the amendatory act to section 2324 of the Revised Statutes of the United States, and availed herself of its provisions by complying therewith, and did not either perform any assessment work on the claims, nor contribute her proportion of the work and labor done and performed by Irvine. Irvine, having performed the necessary assessment work, published the demand and notice for contribution, as provided for by section 2324, for the period of 90 days beginning January 27, 1894, and made proof of the publication and demand, and had the same duly recorded.

Was the interest of Spencer forfeited by his failure to contribute to the assessment work done by Irvine on the Chicago claim in 1892? Did complainant's grantor forfeit her interest in the contiguous group of mining claims by her failure to do any work, or to contribute her proportion for the work done by Irvine, in 1893?

Section 2324, among other things, provides as follows:

"Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures."

On the 3d day of November, 1893, section 2324 was amended as follows:

"That the provisions of section 2324 of the Revised Statutes of the United States which require that on each claim located after the 10th day of May, 1872, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year 1893, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year 1893: provided, that the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed on or before December 31st, 1893, a notice that he or they in good faith intend to hold and work said claim." 28 Stat. 6.

1. The work done upon the Irvine tunnel in 1892, as well as in the previous years, was wholly insufficient to constitute a compliance with the provisions of section 2324 as to the amount of the annual assessment work to be performed on the Chicago claim. It was only sufficient to hold the three mining claims that were contiguous, viz. the Provider, Morse, and California. *Chambers* v. *Harrington,* 111 U. S. 350, 4 Sup. Ct. 428; *Mining Co.* v. *Callison,* 5 Sawy. 440, 457, Fed. Cas. No. 9,886. The construction and policy of the statute in this respect was to require every person asserting an exclusive right to a mining claim to expend something of labor or value upon it, as evidence of his good faith.

In *Chambers* v. *Harrington,* the court said:

"When several claims are held in common, it is in the line of this policy to allow the necessary work to keep them all alive to be done on one of them. But, obviously, on this one the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. It is equally clear that in such cases the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them."

Undoubtedly, a third party could have made a valid location of the Chicago claim by reason of the failure of the owners to do the assessment work for 1892, and could have obtained a valid title thereto by a compliance with the mining laws. But the question whether one of the co-owners could, under the facts of this case, obtain any right as against the other co-owners in the claim, rests upon an entirely different principle. The necessary work was done upon the tunnel by Irvine, for himself and as agent of the others, under the mistaken idea that the work so done was sufficient to hold the four claims. Irvine reported that sufficient work had been done to hold all the claims. It was his duty to do the necessary work to hold each claim. He could not take advantage of his own wrong. By doing the extra work on the Chicago he did not gain any right for himself which he could set up against the co-owners in the claim.

In *Hunt* v. *Patchin,* 35 Fed. 816, the complainant was induced by defendant's representations to believe that the claims in which they were jointly interested would be forfeited and relocated for the benefit of all the owners. The claims were forfeited, and defendant claimed to have relocated the claims for his own benefit. Prior to the relocation he was managing the mines on behalf of himself and his co-owners. He was in a position of trust, and was bound to protect their interests. The court said:

"It was his duty not to permit a forfeiture for the purpose of relocating and acquiring the whole for himself without their knowledge and consent. * * * By his act and this breach of faith, he threw his

associates off their guard, and prevented them from taking other means to protect their interests. The Civil Code of California embodies the rule as it before existed, under the common law in equity jurisprudence, and as it now exists in Nevada, without a code in the following language: 'One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful acts, is, unless he has some other or better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it.' Civ. Code Cal. § 2224. * * * He stood in a confidential relation to complainant, being an associate owner, intrusted with the management of the property. His duty, certainly, was to deal fairly by his associates. In my judgment, there was fraud; also, a violation of trust."

See also, *Lockhart* v. *Rollins* (Idaho) 21 Pac. 413.

Applying these principles to the facts of this case, it is clear that Irvine acquired no rights against his co-owners by the work done on the Chicago in 1892.

2. With reference to the work done in 1893: The contention of the defendants is that Irvine had a vested right to contribution from his co-owner upon his completion of the annual assessment work for that year, and that, such co-owner having failed to contribute her proportion, and Irvine having given the notice and demand for the required time, at the end of 90 days, thereby became the owner of the property. The contention of complainant is that, when congress suspended the forfeiture clause for nonperformance of the annual assessment work for the year 1893, no such rights to such forfeiture existed, and no forfeiture could thereafter be enforced between the co-owners for the work previously done by Irvine, and that the only remedy would be an action for contribution between the co-owners for expenditures incurred or made for the common benefit of all the owners. Which contention is correct? Under the statute as it existed prior to the amendment, the owners of mining claims had until December 31, 1893, to do the annual assessment work. It cannot, therefore, be said that any vested right to forfeiture occurred, or could occur, prior to the expiration of that time. A vested right is property arising from contract or from the principles

of the common law, which cannot be destroyed, divested, or impaired by legislation. In cases where a contract is made and executed in pursuance of a statute, which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is a part of the contract, and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made. But imperfect and inchoate rights are subject to future legislation, and may be extinguished while in that condition. At the time Irvine completed the assessment work, he did not have such a vested right of recovery by contract as prevented congress from repealing or suspending the provisions of the statute in so far as it provided for a forfeiture. The suspension of the provisions of the statute requiring annual work to be done necessarily suspended the right of forfeiture. The forfeiture imposed by the statute was for failing to do the work which the law then required to be done. The suspendatory or amendatory act provided that the work hitherto required need not be done in 1893, and hence it follows that the right of forfeiture could not thereafter exist for any act omitted in that respect during that year. The enforcement of a forfeiture cannot be had when the law excuses the performance of the condition. The general rule is that statutes providing for forfeitures must be strictly construed. They are, to that extent, analogous to penal statutes; and the rule is well settled that actions on statutes in their nature penal, pending at the time of the repeal of such statutes, cannot be further prosecuted after such repeal unless the repealing act, in terms, saves the right to prosecute pending suits. There is no such thing as a vested interest in an unenforced penalty or forfeiture. *Norris* v. *Crocker,* 13 How. 429; *U. S.* v. *Claflin,* 97 U. S. 546, 553; *Railroad Co.* v. *Grant,* 98 U. S. 398, 401; *U. S.* v. *Auffmordt,* 122 U. S. 197, 209, 7 Sup. Ct. 1182; *Id.*, 19 Fed.

893; *Bank* v. *Peters*, 144 U. S. 570, 2 Sup. Ct. 767; *Iron Co.* v. *Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Lamb* v. *Schottler*, 54 Cal. 319, 325; *Railway Co.* v. *Crawford*, 11 Colo. 598, 19 Pac. 673; *Railroad Co.* v. *Austin*, 21 Mich. 390, 397; *Gregory* v. *Bank*, 3 Colo. 332, 336. In support of the text that "the repeal of a statute prescribing a penalty or forfeiture recoverable in a civil action takes away the right of recovery," numerous authorities are cited in 23 Am. & Eng. Enc. Law, 509, and it is there stated that there is no vested right in the penalty or forfeiture until recovery has been had by final judgment. It is fair to presume that congress intended the amendatory act to apply to all cases, and to release the owners from any forfeiture where the amount of annual work had been done by one of the co-owners before the passage of the amendatory act, as well as to the failure of doing the work after the passage of the amendment; otherwise, a proviso should, and doubtless would, have been inserted to the effect that the amendment should not apply to cases where the annual work had been done, so as to deprive such co-owner of the right to have the interest of his co-owner, who failed to contribute, forfeited. The amendatory act, in fact, suspended the statute for the year 1893; and the statute being suspended, there could be no forfeiture. There being no contractual relations between the parties to be impaired by such an amendment, and no vested right having accrued to Irvine, it was within the power of congress to pass the act, and it is the duty of the court to uphold it. The contention of the defendants cannot be sustained.

3. What is the interest of the respective parties in the property? It is admitted that each party has an undivided one-half interest in all the property except the Morse claim and the Irvine tunnel. The complainant claims to be the owner of an undivided two-thirds interest in the Morse mine and the Irvine tunnel. The defendants claim to be the owners of a two-thirds interest in the Morse mine, and of an undi-

vided one-half interest in the tunnel. The tunnel was located in 1888, in the names of Spencer and Irvine jointly, without specifying any particular interest for either. It was located for the express purpose of being used to prospect and develop the mining claims in Kingston district, owned by the respective parties. If completed, it would reach the lode on the Morse claim. But it was not located nor run for the sole benefit of the Morse claim. There is therefore no substantial reason for holding that the interest of each in the tunnel is to be governed by their respective interests in the Morse mine. On the other hand, the equity of the disputed question calls for an equal division of the interests in the tunnel, wholly independent of the decision as to the rights of the parties in the Morse mine. In endeavoring to determine the question as to the respective interests of the parties in the Morse mine, the court is confronted by a mass of conflicting evidence, and by numerous objections made to the admissibility of certain testimony and exceptions taken by the respective parties. In addition thereto, there is shown to be much ill feeling and many charges of fraud and bad faith on both sides. But, in the main, it will not be necessary to notice the conflict in the evidence, nor to advert to any of the facts concerning the ill feeling of the parties, or to pass upon the objections made to the evidence, because there is enough in the undisputed facts to enable the court to come to a proper decision upon the controlling questions upon this branch of the case. In 1864 a location was made by Irvine and others of a claim known as the "Gold Point Lode," 1,400 feet long, and 200 feet wide, which covered substantially the ground now embraced in the Morse claim. The title to this claim was kept good until 1876, when it was abandoned, and it was that year located in the name of W. B. Morse, in order to have a claim 1,500 feet long and 600 feet wide under the act of congress.

In 1881, Morse conveyed the entire claim to the defendant Irvine. In 1882, Irvine conveyed an undivided one-third

interest therein to George E. Spencer. There is no dispute as to this third interest. The entire controversy as to the other one-third interest hinges upon the questions of the validity, construction, and effect to be given to a paper designated as "Exhibit B," introduced by the complainant, and certain legal points raised by counsel in regard thereto. This document mentions many mining claims and other property, and specifies different and distinct interests in the various properties therein named. It bears date, "Aurum, Nev., March 6, 1886," and, omitting the other claims mentioned therein, reads as follows:

"J C. Irvine will deed to Geo. E. Spencer all my interest in * * * one-third of the Morse mine, at Kingston, Nevada. * * * The above mentioned property is all in the name of Irvine, except the three last named claims, and those Irvine has my power of attorney to deed.
"W. B. MORSE."

Then follows:

"I accept the above order, and will deed to Geo. E. Spencer, as requested, whenever he asks it. J. C. IRVINE."

This document was recorded in the county recorder's office of Lander county, at the request of George E. Spencer, August 27, 1892. The contention of the defendants is that the insertion of the "one-third of the Morse mine at Kingston," in the document, was a mistake; that Morse at that time had no interest in the Morse mine; that the document was not read over at the time it was signed by the parties; that the claim now made is stale and false; that the document was abandoned, and never relied upon as constituting any title to any of the mining or other property mentioned therein; that it was never recorded until after the friendly relations existing between the parties were severed; and that reliance upon this instrument is an afterthought, etc. The Morse is not one of "the three last-named claims" for which Irving has Morse's "power of attorney to deed," but is one of

the mines the title to which is referred to as being in the name of Irvine. It appears from Irvine's testimony that he and Spencer abandoned their respective rights under Exhibit B in all of the mining claims therein mentioned, except the Morse claim; and that Irvine, for their joint benefit, relocated the same; and that Spencer's interests in several of the relocations were greater than is mentioned in Exhibit B. The Morse claim, however, was not relocated. Exhibit B remained in the possession of Spencer. In 1892 he demanded from Irvine a deed of an undivided third interest in the mine. Irvine refused to convey, and the document was thereupon recorded. On behalf of complainant it is shown that Gen. Spencer, after obtaining possession of Exhibit B, expended large sums of money upon the faith thereof, and that Irvine attended to the management of the property for Spencer. The fact that Spencer abandoned his rights under Exhibit B to other mining claims therein mentioned does not prove that he abandoned his interest therein to the Morse mine. He never surrendered the document. He never abandoned or destroyed it. The statute of limitations could not be said to have commenced to run until the demand was made for a deed and denied. The claim of any interest under Exhibit B cannot, in the light of all the undisputed facts, be considered stale. The mere fact that the legal title was in Irvine at the time the order was signed by Morse furnishes no excuse upon the part of Irvine for failing to execute a deed as directed by the order, he having in writing agreed to comply with the order. It is admitted by the defendants that the signatures of W. B. Morse and J. C. Irvine attached to the document are genuine, and Mrs. Spencer swears positively that she was present at the time the instrument was written and signed, and that it was read aloud by her husband, and fully explained to Morse and Irvine, and that they, with full knowledge of its contents, signed the same in

her presence. The testimony of Morse and Irvine that, at the time of the signing of the document, they were unaware that any reference therein was made to the Morse mine, to have controlling effect, should be corroborated by clear and convincing circumstances or facts. It does not seem probable that men of admitted intelligence and thorough business habits would be likely to sign such a document without knowing its contents. In *Gage* v. *Phillips,* 21 Nev. 150, 26 Pac. 60, it was held that ignorance of the contents of a written instrument upon the part of a party signing it, when neither fraud in its procurement nor falsity of any representations is alleged, will not excuse the party signing it from its legal effect. In *Kinney* v. *Mining Co.,* 4 Sawy. 384, 445, Fed. Cas. No. 7,827, it was held that relief in equity on the ground of mistake in cases of written instruments will only be granted where there is a plain mistake clearly made out by satisfactory proofs. "The proof must be such as will strike all minds alike as being unquestionable, and free from reasonable doubt." 1 Story, Eq. Jur. § 157. The proofs in the present case fall far short of convincing the court that Morse and Irvine were ignorant of the contents of the instrument which they both admit they signed.

But it is earnestly argued by defendants' counsel that the order or document in question is of itself wholly insufficient to pass any title whatever to the property; that, at most, it only creates an equitable interest therein, which is not pleaded; that it only raises an equity in favor of complainant's grantors; and that complainant is not entitled to have a sale or partition of such an equitable title. No steps have been taken to compel Irvine to convey the title of this one-third interest in the Morse mine since the demand therefor was made. No relief of that character is specially asked for in the complaint. Has this court the power, under the facts pleaded, to make a decree for the sale or partition of any

mere equitable interest in the property? If it has no such power or authority, is it its duty, of its own motion, to continue this suit until proper pleadings are had to perfect the legal title thereto in complainant? The broad question is presented, and must be met, whether the court, having general equitable jurisdiction in the premises, ought not to treat that as done which in equity and good conscience ought to have been done, and enter a decree accordingly? The respective parties have introduced their evidence bearing upon the question as to their respective interests in the Morse mine. The facts are therefore before the court, and, if it has the power to finally adjust and settle the matter, there is no other substantial reason that has been presented why it should not do so. The prayer of the complainant asks "for such further or other relief in the premises as the nature of the circumstances of this case may require and to this honorable court shall seem meet." The conveyance by Gen. Spencer to his wife, and her conveyance to the complainant, are of all their "right, title, and interest in the property."

The statutes of Nevada in relation to actions for the partition of real property provide that "the rights of the several parties, plaintiffs as well as defendants, may be put to issue, tried and determined by such action." Gen. St. Nev. § 3295. The pleadings in this suit raise the issue as to the rights of the respective parties in the Morse mine, and under the provisions of the statute this issue may be tried and determined in the suit for partition. *De Uprey* v. *De Uprey,* 27 Cal. 330, 335; *Morenhout* v. *Higuera,* 32 Cal. 289, 294; *Bollo* v. *Navarro,* 33 Cal. 459. In cases of equitable titles in suits for the partition of lands, it seems now to be the settled practice for courts of equity to take jurisdiction of the whole matter, and grant full relief. 1 Story, Eq. Jur. § 653 et seq.; 3 Pom. Eq. Jur. §§ 1386, 1388, et seq.; *Hayes' Appeal,* 123 Pa. St. 110, 132, 16 Atl. 600; *Lucas* v. *King,* 10 N. J. Eq. 277, 280; *Read* v. *Huff,* 40 N. J. Eq. 229, 233; *Jar-*

rett v. *Johnson,* 11 Grat. 327; *Perry* v. *Richardson,* 27 Ohio St. 110, 120. In *Crosier* v. *McLaughlin,* 1 Nev. 348, it was held that, where one tenant in common with others brings a suit asking for a partition of property, it is immaterial whether he shows that he has a legal title in common with the defendants, or only an equitable title, and that in either case he is substantially entitled to the same relief. I am therefore of opinion that complainant is entitled to a decree for a two-thirds interest in the Morse mine.

4. The next question is whether the court should decree a sale or order a partition of the property. The statutes of Nevada provide that:

"When the action is for partition of a mining claim among the tenants in common, joint tenants, co-parceners or partners thereof, the court, upon good cause shown by any party or parties in interest, may, instead of ordering partition to be made in manner as hereinbefore provided, or a sale of the premises for cash, direct the referees to divide the claim in manner hereinafter specified." Gen. St. Nev. § 3334.

The defendants contend, and the evidence on their behalf tends to show, that the Kingston group of mines, which are contiguous, can only be economically worked through the Irvine tunnel; that this tunnel is run upon the Morse ground, near the center of the location; that it has but one track; that two companies could not work through the same tunnel; and that no division could be made that would not be detrimental to both parties. On the other hand, it is argued by complainant—and the testimony on her behalf tends to support the argument—that a division can be made without injury to the parties; that her interest would be jeopardized by a sale of the property, as she is possessed of limited means, and the defendants would be in a position to purchase the property on their own terms; and that the only practicable way to develop the property is by an incline, instead of through the tunnel. The evidence shows that it would cost in

the neighborhood of $3,000 to complete the tunnel in order to reach the lode. There is no evidence as to the particular value of either of the mining locations, except that, in the opinion of some of the witnesses, the Morse is more valuable than the others. The reasons given by the respective witnesses upon these questions are of about equal weight. This being true, it is the duty of the court to follow the course which the law favors. In section 1390, 3 Pom. Eq. Jur., the question is discussed at some length, and it is there said that, "as between a sale and a partition, however, the courts will favor a partition, as not disturbing the existing form of the inheritance." See, also, *Mitchell* v. *Cline* (Cal.) 24 Pac. 164, 166. A partition of the property will therefore be ordered.

Let a decree be drawn in accordance with the views expressed in this opinion.

FRANCIS I. GOWEN, RECEIVER v. WM. N. BUSH.

(76 Federal 349. Circuit Court of Appeals, Eighth Circuit. October 5, 1896.)

[1]**Assurance of safety by agent.** Plaintiff was induced by an agent of the defendant to come from another state, and take service in defendant's coal mine. The agent represented that the mine was free from explosive gas and in every way safe. Two or three days after plaintiff began work an explosion occurred, by which he was seriously injured: *Held*, that the representations made by the agent touching the condition of the mine were within the apparent scope of his authority, and admissible against the employer, though made without express authority.

---

[1]*Assurance of safety. Neglect to warn.* Miner entitled to rely on foreman's assurance of safety, although miner had stated that it looked suspicious. *Faulkner* v. *Mammoth Co.* 23 Utah 437; 66 Pac. 800.

It is negligence in an oil company to fail to warn infant employee of danger of approaching stove with oil soaked garments. *Wallace* v. *Standard Co.* 66 Fed. 260.

Foreman is a party authorized to make promise to repair machinery on which workman can rely. *Homestake Co.* v. *Fullerton*, 69 Fed. 923.

Where after talk of danger the foreman says there is none, the risk is on the master. *Harder Co.* v. *Schmidt*, 104 Fed. 282.

Workman has the right to rely on promises by vice principal that precautions will be taken. *Carleton Co.* v. *Ryan*, 29 Colo. 401; 68 Pac. 279.

Company is bound by statements as to safety made by its own agents, though plaintiff had other information to the contrary. *East Jellico Co.* v. *Stewart*, (Ky.) 68 S. W. 624.

Defendant liable for accident from new and quicker fuse, not informing employee of the change. *Hedlun* v. *Holy Terror Co.* (S. Dak.) 92 N. W. 31.

A pit boss is a vice principal. The foreman is presumed to know the condition of the roof and his negligence in not informing the employee of it is the master's negligence. *Cons. Coal Co.* v. *Wombacher*, 134 Ill. 57; 24 N. E. 627.

Master's duty to instruct employee as to known dangers cannot be delegated so as to shift the neglect on a co-employee. *Smith* v. *Hillside Co.* 186 Pa. 28; 40 Atl. 287. The same as to placing of safe tackle or machinery. *Donnelly* v. *Booth Co.* 90 Me. 110; 37 Atl 874. *Belleville Co.* v. *Mooney*, 60 N. J. L. 323; 38 Atl. 835.

[1]**Inspector not a fellow servant.** When a miner is charged with the duty of going through the mine from time to time and inspecting it, and seeing whether it is free from gas, he is discharging a personal duty of the master, and while thus engaged is not a fellow servant of the other miners.

Silence not always assent. A person is not estopped by silence to subsequently deny statements made in his presence, when his silence was the result of physical suffering or semiunconsciousness.

[2]**Too remote for res gestae.** Statement made by one of several victims of an accident, three-quarters of an hour after its occurrence, concerning the cause thereof, and the whereabouts at the time of the injured persons, forms no part of the res gestae.

Duty of master to warn a reasonable time before shooting. *Belleville Co.* v. *Mooney*, 60 N. J. L. 823; 38 Atl. 835.

Gas Explosion. Employee not warned if he failed to see posted notice of danger. *Costa* v. *Pacific Co.* 26 Wash. 138; 66 Pac. 399.

Where the foreman represents that a shaft is safe the miner has a right to rely on the statement. *Morbach* v. *Home M. Co.* 53 Kans. 731; 37 Pac. 122.

[1]*Fellow servants.* Foreman of one shift a fellow servant with the other shifts. *Davis* v. *Trade Dollar Co.* 117 Fed. 122.

Servant helped fellow servant in work outside of plaintiff's duties and received injury. *Held*, he could not recover. *Knox* v. *Pioneer Co.* 90 Tenn. 546; 18 S. W. 255.

Whether A and B were fellow servants, is a jury question. Contributory negligence the same. *Alaska Co.* v. *Whelan*, 64 Fed. 462.

Two tunnels run by same company under different superintendents. *Held*, the workmen in the two tunnels were not fellow servants. *Uren* v. *Golden Co.* 24 Wash. 261; 64 Pac. 174.

In furnishing safe tools, or in neglecting to furnish them, the foreman is not a fellow workman, but the vice principal. *Lehigh Val. Co.* v. *Warrek*, 84 Fed. 866.

Tunnel boss held fellow servant with trammer where the latter was injured by fall of scale. *Ross* v. *Union Co.* 25 Ind. App. 463; 58 N. E. 500.

An employee engaged in seeing that safe place to work is provided acts as vice principal. *Linton Co.* v. *Persons*, 11 Ind. App. 264; 39 N. E. 214.

Defendant held liable for sending back miner to relight a missed fuse. Consideration of the relations of parties where there is a general superintendent in control of the bosses. The boss does not lose his vice principal character in doing miners' work. *Vane* v. *Irwin.* (Mo.) 72 S. W. 522.

[2]The cause of an accident may not be proved by the dying declarations of the party injured. *Lendberg* v. *Brotherton Co.* 75 Mich. 84; 42 N. W. 675.

[1]**Latitude to counsel. Expectation of life.** Remarks of counsel on amount of damages based on plaintiff's expectation of life quoted, and held allowable.

In error to the United States Court in the Indian Territory.

J. W. MCLOUD, for plaintiff in error.

WILLIAM H. H. CLAYTON (JAMES BRIZZOLARA, JAMES B. FORRESTER, and JAMES PARKS & SON, with him on the brief), for defendant in error.

Before CALDWELL, SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge. The writ of error in this case was heretofore dismissed for want of jurisdiction in this court to hear and decide the case. 18 C. C. A. 572, 72 Fed. 299. It has since been restored to the docket in compliance with the provisions of an act of Congress approved on February 8, 1896 (29 Stat. 6, c. 14), and is now before us for determination on the merits. The action was brought by William N. Bush, the defendant in error, against Francis I. Gowen, sole receiver of the Choctaw Coal & Railway Company, the plaintiff in error, to recover damages for personal injuries which the plaintiff below sustained by reason of an explosion in a coal mine located at Hartshorne, in the Indian Territory. The mine in which the explosion occurred was being operated at the time by the defendant, Francis I. Gowen, in his capacity as receiver of the aforesaid company. The plaintiff, William N. Bush, was a common miner in the employ of the receiver, who had worked only 2½ nights in the mine when the explosion occurred. The complaint on which the case was tried charged, among other things, as a ground for recovery, that when the plaintiff took service in said

[1]*Portland Co. v. Flaherty*, 111 Fed. 312.

mine, it was represented to him by the agents of the receiver who employed him that the mine was in every way safe, and especially that it was free from explosive gases, whereas, in point of fact, as his employer, the said receiver, well knew, said mine generated explosive gases which rendered it at all times extremely dangerous and unsafe, and subjected persons who were employed therein to great peril. It was also charged by the plaintiff below, in substance, that the dangerous condition of the mine occasioned by the existence of explosive gases was wholly unknown to him up to the time that the explosion occurred, and that he sustained the injuries complained of as the result of being induced to go to work in said mine, believing it to be safe and free from explosive gases, without any fault or negligence on his part which directly contributed to the explosion. There was a trial, and a verdict in favor of the plaintiff below.

The first error that has been assigned for our consideration is that the trial court erred in failing to direct a verdict for the defendant below. The argument in support of this assignment is founded upon the claim that there was no evidence before the jury tending to show that the defendant had been guilty of any violation of duty, or that he was in any respect negligent. We think, however, that this point is untenable, and should be overruled. The record discloses that there was evidence before the jury which tended to show that the plaintiff was a miner of some 10 years' experience, who had always been accustomed to work in mines that did not generate gas in explosive quantities; that he had been induced by an agent of the receiver, by the name of Gabe Gideon, to come from Calhoun, Mo., where he resided, to Hartshorne, in the Indian Territory, for the purpose of taking service in a new mine at that place which had recently been opened by the receiver, and was being worked both by night and by day, and that he had only arrived at said mine and taken service therein about three days before the explo-

sion occurred; that representations were made to him at his home in Missouri, by the receiver's agent, for the purpose of inducing him to come to Hartshorne, to the effect that the mine at that place was free from gas, and was perfectly safe, and that similar representations were made to him by the assistant superintendent of the mine after his arrival at Hartshorne, before he went to work. There was further evidence tending to show that the mine in question did generate explosive gas in considerable quantities; that this fact was known to the agents of the receiver who had immediate charge and supervision of the mine; and that the plaintiff was seriously injured by an explosion of gas in the mine, which took place about the middle of the third night that he worked therein, before he had become acquainted with its condition and the dangers incident thereto. As there was testimony before the jury tending to establish these facts, it is manifest that the court would have erred in withdrawing them from the consideration of the jury on the theory that they constituted no proof of culpable negligence. The doctrine is well settled and elementary that it is a master's duty to notify his servant of any hidden defect in the place where the latter is expected to work which increases the ordinary risks of the employment, and to advise him of any latent danger which may attend the doing of any work which the servant is called upon to perform, provided the defect or the danger in question is known to the master and is unknown to the servant. A master violates his duty and is guilty of culpable negligence whenever, without warning, he exposes his servant to a risk of injury which is not obvious and was not known to the servant, provided the master himself was either acquainted with the risk or in the exercise of ordinary care ought to have been acquainted with it. *Baxter* v. *Roberts*, 44 Cal. 187; Whart. Neg. §§ 209-211; Shear. & R. Neg. (4th Ed.) § 203; Bailey, Mast. Liab. p. 111. In the present case there was evidence which at least tended to show that

the defendant not only failed to warn the plaintiff of the known presence of gas in the mine in such quantities as might cause an explosion, but that the plaintiff was thrown off his guard, and not led to expect the presence of gas in dangerous quantities, by the assurance of those who employed him that the mine was safe and free from gas. We think, therefore, that the evidence above referred to made a case which entitled the jury to decide whether the defendant was in fact negligent, and whether his negligence was the proximate cause of the plaintiff's injuries.

In this connection it will be as well to notice another error which is assigned to the action of the trial court in admitting testimony concerning the representations that were made to the plaintiff at his home in Calhoun, Mo., by Gabe Gideon, the receiver's agent, to the effect that the mine where the plaintiff and his associates were expected to work was safe and free from gas. It is claimed by the plaintiff in error that the proof of these representations was inadmissible for the reason that Gabe Gideon had no authority to make them. It is not denied that he was authorized by the receiver to go to Calhoun, Mo., and solicit the plaintiff and some other miners to come to Hartshorne for the purpose of obtaining employment; neither is it denied that his expenses for making that trip were paid by the receiver. The objection to the testimony is that he was not authorized to make a hiring contract, nor to make representations as to the condition of the mine in which the men would be expected to work. We think that this objection to the testimony is untenable. It being conceded that Gabe Gideon was authorized by the receiver to induce or solicit the plaintiff and other miners to go to Hartshorne for the purpose of obtaining work, and that his expenses in making the trip were paid by the receiver, it follows, we think, that it was within the apparent scope of the agent's authority to make representations touching the condition of the mine. Laborers who were thus solicited to go some dis-

tance from their place of residence into an adjoining state, in pursuit of a job, would naturally desire to know something about the character of the work at that place, the wages that they would probably earn, and, if they were to work in a mine, they would doubtless desire to know something about the condition of the mine and the risks that they would be likely to incur in working in it. They would naturally assume that the agent of the employer was authorized to give information with reference to such matters. We think, therefore, that the representations made by the agent touching the condition of the mine, as a means of inducing the plaintiff and others to go to Hartshorne, were within the apparent scope of the agent's authority, and that they were admissible against the employer, even though he had not expressly authorized the agent to make them. It is a well-known rule that a principal is always bound by the acts of his agent that are within the apparent scope of the agent's powers, although such apparent powers may have been limited by secret instructions of the principal that were not communicated to those with whom the agent dealt.

It is further assigned as error that the trial court refused to give two instructions which were asked by the receiver, which instructions were to this effect: That two of the receiver's employes, to wit, John Murphy and James Scarratt, were fellow servants of the plaintiff; and, if the explosion was occasioned by the negligence of either of these men in failing to discover the presence of gas in portions of the mine other than the place where the plaintiff was at work, then the defendant was not liable to the plaintiff for such neglect on the part of these men. A sufficient reason why neither of these instructions should have been given in the form in which they were asked is found in the fact that, in so far as the duty was devolved upon these men (John Murphy and James Scarratt) of going through the mine from time to time and inspecting it, and seeing whether it was free from gas,

they were discharging a personal duty of the master which he owed to all the miners who were at work in the mine, and while discharging such personal duty of the master, these men were not fellow servants of the plaintiff, no matter what relation they may have occupied towards him when they were engaged in the performance of other and different duties. An obligation rests upon the master to exercise ordinary care in providing a reasonably safe place for the servant to work, and also to use ordinary diligence in keeping it thereafter in a reasonably safe condition. This is a personal duty of the master, which he cannot devolve upon another in such a way as to relieve himself from liability in case the duty is not performed or is discharged in a negligent manner. *Railway Co.* v. *Jarvi,* 10 U. S. App. 439, 447, 3 C. C. A. 433, 435, and 53 Fed. 65, 67, and cases there cited. Moreover, as this court, speaking by Judge Sanborn, said in that case:

"The care and diligence required of the master are such as a reasonably prudent man would exercise under like circumstances in order to protect his servants from injury. They must be commensurate with the character of the service required, and with the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. Obviously, a far higher degree of care and diligence is demanded of the master who places his servants at work digging coal beneath overhanging masses of rock and earth in a mine than of him who places his employe on the surface of the earth, where danger from superincumbent masses is not to be apprehended."

It is evident, we think, that the instructions in question were faulty, and ought not to have been given, for the reason that they exempted the receiver from responsibility for the negligent performance of one of his personal duties, to wit, the duty of properly inspecting the mine, and seeing that it was kept in a reasonably safe condition.

Complaint is further made of the action of the trial court in excluding certain admissions or statements said to have been made by Henry Zeller to Michael E. Burke, about three-

quarters of an hour after the accident occurred; also of its action in excluding statements said to have been made by said Henry Zeller, in the presence of the plaintiff, to John Murphy, the morning after the accident. With reference to the statements said to have been made to John Murphy in the plaintiff's presence the morning after the accident, it is sufficient to say that the record recites that the proof of such statements was excluded by the trial court because the plaintiff, William Bush, was at the time "unconscious, or in such a state of semi-unconsciousness and in such a physical condition as not to be estopped by his silence." There is nothing in the present record which shows that he was not in the condition last described, and for that reason the tesimony was properly excluded. The admissibility of the other statements or admissions above mentioned is urged upon the ground that they formed a part of the res gestæ, and also on the ground that in making them Henry Zeller acted as the agent of the plaintiff. There was no testimony in the case, however, so far as we can discover, which would warrant the conclusion that Henry Zeller, or any other person, was the agent of the plaintiff for the purpose of making admissions or statements after the accident as to how the explosion had been occasioned. Besides, the statements in question were not so related to the explosion as to make them a part of the res gestæ. A brief statement of the circumstances under which the alleged statements were made is quite sufficient, we think, to justify the latter conclusion. About three-quarters of an hour after the explosion occurred, four men who had been badly burned and otherwise injured by the explosion had been taken out of the mine, and were lying in the engine house at the mouth of the shaft. Among the number were Henry Zeller and the plaintiff, William Bush, the latter of whom was evidently in great agony from the burns which he had received, if he was not entirely unconscious. Michael E. Burke, one of the defendant's witnesses, inquired of Henry

Zeller how the accident occurred, and he undertook, as it seems, to give an account of the explosion, and where the four victims of the explosion were when it occurred. The statements thus made were clearly a narrative of a past transaction, and in no sense a part of the res gestæ. *Railway Co.* v. *McLelland,* 27 U. S. App. 71, 10 C. C. A. 300, and 62 Fed. 116; *Association* v. *Shryock,* 20 C. C. A. 3, 73 Fed. 774, and cases there cited. The trial court, therefore, did not err in excluding such testimony.

Some other errors have been assigned, based on the ground that the trial court erred in refusing to give several instructions which were asked by the defendant below, but were not given in the precise form in which they had been formulated. Without setting out these instructions in detail (which would subserve no useful purpose), it is sufficient to say that we have examined them in connection with the charge which was given by the trial court, and in view of such comparison we are satisfied that, in so far as the several instructions in question stated correct propositions of law, they were substantially embodied in the trial court's charge to the jury. No error was committed, therefore, in refusing to give these instructions in the precise form in which they were asked.

The only other assigned error which we deem it necessary to notice is an exception which was taken to certain remarks that were made by counsel for the plaintiff below in his closing address to the jury. That portion of the argument to the jury to which an exception was taken, and the exception itself, appear in the record in the following form:

"'Now, as to the question of damages. There can be no question as to our right to recover. What is to be the damages? We have sued for $10,000. That sounds to us, of course, like a pretty good sum, but is there money enough in the depths of the earth, have the mines ever produced enough wealth, to compensate a man for being placed in the condition of this man? Twenty-nine years of age, strong, vigorous, a happy husband of a loving wife, the father of two fine children, called upon to support himself and his family by the labor of his hands and

the sweat of his face, with no earthly power by which he could support himself, placed in the condition he is in, besides the mortification of having to go disfigured as he is through life. Now, I am not a very good-looking man. I sometimes wish I were; yet I would not have that little good looks I have taken from me, and be compelled to totter through life disfigured, distorted, crippled,—I can hardly use terms strong enough,—like this man is, for all the gold in the world. He has a right to be paid for his mortification; he has a right to be paid for his mental suffering; for his physical suffering; for the suffering that was endured by the frying and the sizzing and the burning of his flesh upon that occasion; for every hop that he makes upon his poor, lame leg; he has a right to be paid for every scar upon his body; for every minute of time he is thrown out of employment; for the mental suffering that has been put upon him by this company. The mortality table shows that he has an expectancy of life of 36 years. The proof shows that he is totally disabled for working, and, at the rate of $2.00 a day for that length of time, would make twenty-two thousand and some hundred dollars he would be entitled to under the proof. But, say he is not totally disabled, that he has one-half the power he had before this terrible thing came upon him, and you have over $11,000, nearly $12,000, to say nothing of the suffering to his body and the mental suffering of his mind. This is an easy thing, and you can count it up for yourself. We say the amount sued for is reasonable, and we ask you to give us the whole amount. We believe we are entitled to it, and shall feel disappointed if we do not get it.'

"To which language of counsel for plaintiff, defendant objected as improper and prejudicial to the defendants, and as not stating the legal and proper rule for the measure of damages."

There are several reasons, we think, why this exception is not sufficient to warrant a reversal of the judgment. In the first place, the exception as taken goes to all that was said in the paragraph above quoted, and very much of what was thus said did not transcend the limits of legitimate argument to a jury. Counsel was entitled to comment on his client's condition, the nature and extent of his disabilities and sufferings, and to impress upon the minds of the jurors the inevitable effect of the injuries that had been sustained. To this extent, no doubt, the remarks made by counsel were in the line of his duty, and not subject to criticism; and we have heretofore held, following a well-settled rule on that subject, that in stating an exception to a charge, some portions of

which are correct and some incorrect, the exception, to be tenable, must point out the particular error complained of, and not be addressed to the charge as a whole. *McClellan* v. *Pyeatt,* 4 U. S. App. 319, 1 C. C. A. 613, and 50 Fed. 686. The same rule may be properly applied to an exception taken to the remarks of counsel. Such exceptions should be made specific, so as to advise both court and counsel in what respect the line of argument is deemed objectionable or unfair. But let it be conceded that it appears with sufficient certainty that the exception was aimed at the closing paragraph of the above excerpt, in which counsel for the plaintiff below referred to his client's expectancy of life, and contended for an assessment of damages based on that expectancy, yet even in that event we do not think that the language employed would justify a reversal of the case. It will be observed, taking all that was said into consideration, that counsel for the plaintiff below merely referred to the nature of his client's injuries, sufferings, and physical condition, and to his age, expectancy of life, and earning capacity (all of which were facts in evidence), and, in view of such considerations, contended before the jury that the sum sued for was reasonable in amount, and that his client was justly entitled to the amount of damages claimed in his complaint. As the sequel showed, however, the jury did not regard the sum sued for as reasonable, and were not influenced by the appeal that was thus made to them, for they only allowed the plaintiff one-half of the amount claimed. It is apparent, therefore, that the language complained of did no harm, even if it was subject to criticism. In support of the assignment of error now under consideration we have been referred to a previous decision of this court in the case of *Railway Co.* v. *Farr,* 12 U. S. App. 520, 528, 6 C. C. A. 211, and 56 Fed. 994. We adhere to what was there said and decided, but the case referred to and the one now in hand are not parallel. In the former case counsel for the plaintiff stated to the jury, in substance, that they should

assess the plaintiff's damages by finding out what amount he could earn in a month, then multiply that by 12, and then multiply the latter amount by the number of years constituting his expectancy. The direction thus given to the jury by the plaintiff's counsel was objected to by opposing counsel, and in overruling the objection the trial court practically approved the direction that had been given to the jury by saying: "That is a fair argument." We held that to be a manifest error, but no such case is made by the present record.

It results from what has been said that we find no material error in the proceedings of the trial court, and the judgment of that court is accordingly

Affirmed.

A. F. MIGEON ET AL. v. MONTANA CENTRAL RAILWAY CO.

(77 Federal 249. Circuit Court of Appeals, Ninth Circuit. October 6, 1896.)

Test to maintain decree in equity. A decree in equity will not be reversed for error in admitting or rejecting evidence, where all the circumstances show that the result was not affected thereby. The controlling inquiry is whether there is sufficient competent evidence in the record to sustain the decree.

Inspecific briefs and assignments. When a specification of error as to the rejection of evidence states only the subject of the evidence, and does not give its substance, and the brief contains no reference to the page of the record showing the ruling, as required by rule 24 of the circuit court of appeals for the ninth circuit, the matter is not properly brought to the attention of the court.

[1]**An abandoned lode claim becomes part of the public domain,** subject to sale and disposition by the government.

[2]**To be excluded, lode must have value.** A vein lying within the limits of a placer patent is not excluded therefrom as a "known vein or lode," under Rev. St. § 2333, unless at the date of the application the lode or vein was clearly ascertained, and of such extent and value as to justify exploitation. The fact that the lands were at one time previous to the application for the patent supposed to contain a lode or vein of value, or that they were afterwards discovered to be of value, does not impair the title under the patent.

---

[1] *Harkrader* v. *Carroll*, 18 M. R. 474.

[2] To be excepted from placer must be of extent and value to justify working. *Casey* v. *Thieviege*, 18 M. R. 624.

Location where a lode claim is laid over a placer in a town site after patent applied for it, is suspicious. *Id.*

The existence of the lode within the placer must be actually known not presumed from character of ground. *Clipper Co.* v. *Eli Co.* 29 Colo. 377; 68 Pac. 286.

Placer patent is conclusive evidence that the land was placer ground. *Butte Co.* v. *Sloan*, 16 Mont. 97; 40 Pac. 217.

The width of lode location over placer claim is limited to 50 feet. *Mt. Rosa Co.* v. *Palmer*, 26 Colo. 56; 19 M. R.—.

The owner or a stranger may locate within bounds of possessory placer claim. *McCarthy* v. *Speed*, 11 So. Dak. 362; 19 M. R.—. *Mt. Rosa Co.* v. *Palmer*, *supra*. *Contra*, *Clipper Co.* v. *Eli Co.* *Supra*, (By a divided Court).

[1]A lode had been located, recorded and its annual labor done for some years, but had been abandoned at date of placer application and had not at that time known workable value. *Held*, not such a known lode as to be excepted from the grant of the placer patent.

Appeal from the Circuit Court of the United States for the district of Montana.

This was a suit by the Montana Central Railway Company against A. F. Migeon, B. Tibbey, and N. B. Ringeling to determine an adverse claim to certain mining ground. The circuit court rendered a decree for the plaintiff (68 Fed. 811) and the defendants have appealed.

GEORGE A. CLARK, for appellants.

A. J. SHORES, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a suit in equity, brought by the appellee to determine the adverse claim of appellants to two certain tracts of land, or mining ground, in area 3.67 and 9.60 acres, respectively, situated near Butte, in Silver Bow county, Mont. From the mass of testimony introduced by the respective parties we glean the following facts: On July 2, 1877, Charles Colbert located a quartz lode upon the premises in dispute, under the name of the "Morning Star Lode Mining Claim," containing 1,500 feet in length,—750 feet east and 750 feet west of the point of discovery,— and 300 feet wide on each side of the center of the vein or lode. The discovery point was about 20 feet east of the east boundary of the Noyes placer claims, hereinafter mentioned. Upon the Morning Star a shaft was sunk at the discovery point in 1877, about 14 feet deep, which disclosed rock of a brown and green stained color, containing mineral, viz. gold,

[1]*Dower* v. *Richards*, 17 M. R. 704.

silver, and copper. About 10 tons of ore was taken out from this shaft, and some of it still remains upon the surface. There is some conflict in the testimony as to the value of the ore found in this shaft, but the decided weight and preponderance of the evidence is to the effect that it was not of sufficient value at that time to justify exploitation and the expenditure of time, labor, and money. The ground embraced in the lode location was full of strata and seams of rock; but, in the opinion of some of the witnesses, it would not be classified as a vein among mining men or prospectors. It was valuable for surface mining, and was profitably worked as placer ground. Another shaft was sunk in 1878, about 75 feet west of the discovery point, about 8 feet deep, which disclosed the same character of material as the discovery shaft. Sufficient work was done upon the claim to hold it for the years 1877 and 1878. In April, 1879, the claim was sold to Valentine Kropf. There is some uncertainty as to the date of the sale. Colbert testified: "I would not exactly be certain when I sold it,—whether it was in April, 1879, or 1880." Kropf said: "If I remember, it was in the summer. I don't remember the year,—'77 or '78. It might have been in '79." Prior to the sale, the claim was jumped by other parties; but Colbert, the original locator, and the subsequent locators, divided their interests equally. Colbert sold his half interest to Kropf for $75. The other half was owned by H. McKinstry. The same year, and shortly after the sale, Kropf and McKinstry quit work on the claim, because there was too much water in the shaft, and have never done any more work thereon, and never bothered themselves with the claim any more. To quote from the testimony of Mr. Kropf:

"Q. After you had worked there several days, you quit? A. Yes, sir. Q. What was the reason for that? A. On account we could not get any further. There was too much water for us. Q. Did you ever do any work on that claim after that? A. No. sir. Q. And you never did any work on the second discovery hole? A. No, sir. * * * Q. What did you do with it afterwards? * * * A. I never bothered any more

with it. * * * Q. Did you abandon it, or what? A. I guess we quit it. * * * Q. How long did you and he [McKinstry] remain in partnership after he and you quit work? A. Just when we quit work. We quit, and then I told him I would throw it up. * * * Q. Do you remember of ever having seen any one, after that, doing any work at either of these holes? A. No, sir. Q. Do you remember of ever having seen any location notice after that on this ground? A. No, sir; I never bothered myself about it."

On October 15, 1878, John Noyes and others made a placer location in the vicinity of and including the west 730 feet of the Morning Star lode claim, and thereafter, on December 17, 1878, made application for a patent therefor. On July 25, 1880, a patent was issued for said claims. On January 1, 1882, H. McKinstry located the Childe Harold quartz lode claim at the discovery point of the Morning Star claim, extending 1,450 feet west and 50 feet east of said point, and 300 feet on each side of the center of the vein. Appellants acquired the interest of McKinstry in the Childe Harold location June 20, 1885, and claim to have ever since represented the claim as required by law. On July 25, 1887, appellee acquired the title to the two tracts of land in controversy in this suit from the grantees of John Noyes, the locator of the placer claims. On September 26, 1887, appellants made application for a patent to the Childe Harold lode. Appellee filed an adverse claim, and on December 10, 1887, commenced this suit in the territorial court, and under the provisions of the act of congress admitting Montana as a state, the suit was removed to the circuit court of the United States. The Noyes placer claims, mineral entry No. 511, and the Childe Harold lode claim embrace within their boundaries both tracts of land. The 9.60-acre tract is within the boundaries of the Noyes placer claim and the Morning Star lode claim.

From the foregoing facts it will readily be seen that the controlling question to be determined herein is whether there was a "known lode" within the limits of the ground in con-

troversy at the time the owners of the Noyes placer claims made application for a patent, on December 17, 1878, within the meaning of section 2333, Rev. St. U. S. In its decree the trial court found the following facts:

"That the plaintiff [appellee] is the owner of, in the possession of, and entitled to the possession of, all and singular the premises set out and described in the complaint herein; * * * that said premises constitute and are a portion of mineral entry No. 511, for which application for patent from the United States was duly made upon December 17, 1878, and for which a United States patent was duly issued to the applicants therefor on July 28, 1880; that at the time said application for patent there was no lode of quartz containing gold, silver, copper, or other metals known to exist within the exterior boundaries of said mineral entry No. 511; that all and singular the averments of plaintiff's [appellee's] complaint and replication herein are true, and that the averments of the answer of the defendants herein inconsistent therewith are not true; and that plaintiff is entitled to a decree as prayed for in its complaint herein."

Upon these findings the court granted the relief prayed for in the complaint.

There are 31 distinct specifications of error presented by appellants. It is evident, by a brief reference thereto, that many of them cannot be reviewed by this court, and that it is unnecessary to specifically review others. There is a footnote in the transcript, which states that certain depositions were not read at the trial, and that there was an understanding between counsel and the court that exceptions would be allowed to the rulings that might be made upon the objections noticed in the deposition; but there is nothing in the record showing that any rulings were made upon any of these objections.

The specifications of error from No. 1 to 10, inclusive, are based upon imaginary rulings of the court upon the objections noted in the depositions; the assignments being that the court erred "in rejecting, if it did reject it," etc. Appellate courts are too busily engaged in answering questions which relate to material matters that are properly presented

to waste any time in attempting to review irrelevant specifications of imaginary errors.

The specifications from No. 11 to 20, inclusive, refer to alleged errors committed by the court in admitting or excluding testimony at the trial against the objection of appellants. In the consideration of such specifications of error the general rule is that, in equity suits tried before the judge without a jury, the appellate court ought not to reverse the case merely upon the ground that the judge received irrelevant testimony, or that he rejected testimony that was admissible, where, upon all the facts and circumstances of the case, it is clearly apparent that the result would not have been different if the testimony objected to had been rejected in the one case or received in the other. *Bank* v. *Greenhood* (Mont.) 41 Pac. 251, 267, and authorities there cited; *Scroggin* v. *Johnston,* 45 Neb. 714, 64 N. W. 236, 238, and authorities there cited; *Holmes* v. *State* (Ala.) 18 South. 529. The controlling inquiry in such cases is whether there is sufficient competent evidence in the record to sustain the decree. *Grayson* v. *Lynch,* 163 U. S. 468, 476, 16 Sup. Ct. 1064, 1067. In *Mammoth Min. Co.* v. *Salt Lake Co.,* 151 U. S. 447, 451, 14 Sup. Ct. 384, 386, the court, in considering assignments of error in the admission of evidence, after quoting the language of the territorial court that: "These errors are not available in a case in equity, for the chancellor is supposed only to act on proper evidence. There is no question of law involved; only questions of fact; and, if the proper evidence justifies the decree, the judgment ought to be affirmed, and we think it does,"—said:

"In its assignment of errors here appellant specifies substantially the same exceptions to the admission of evidence, including the overruling of defendants' objections to questions. The evidence thus objected to was cumulative in its character, and not of controlling importance; and, if excluded, it is sufficiently clear that the result would not have been otherwise than it was. All the evidence is in the record, and we have carefully examined it; and, as we are of

opinion that the rulings complained of, if erroneous, did not constitute reversible error, we need not pass upon their correctness, though we are not to be understood as intimating that the objections should in any instance have been sustained."

It is proper to add that some of the assignments of error do not meet the requirements of rule 24 of this court. 11 C. C. A. xcv., 47 Fed. xi. Specification No. 11 will be taken for illustration. It specifies that the court erred "in rejecting the evidence of the engineer, John Gillie, a witness for the appellants at the trial. Exception taken and allowed by the appellants as to the results of an examination made by him of several excavations or shafts upon the Childe Harold claim, and assays of ore taken therefrom, said shafts being on a direct line between shafts A and C, the original points of discovery of the Morning Star vein." Rule 24 of this court provides that: "When the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected," and that the briefs of counsel must contain "a reference to the pages of the record and the authorities relied upon in support of each point." A strict compliance with these provisions would not only be of great advantage to counsel in their arguments, but would materially aid the court and lessen its labors. It is the duty of an appellant to particularly point out the alleged error upon which he relies, and to directly refer the court to the page of the transcript where the alleged erroneous ruling of the court is to be found. Mr. Gillie's testimony covers 25 pages of the printed record, no portion of which is quoted in the specifications. Only two of the pages are referred to in appellants' brief, and on the first one (281) the question to which objection was made was withdrawn, and no ruling of the court was made thereon. On the other page (304) it appears that appellants asked generally that an exception be entered to the ruling of the court in excluding certain specified testimony, which does

not affirmatively appear to relate to the error specified. Upon reading the entire testimony of Mr. Gillie, we fail to find any ruling of the court to which the assignment of error applies. But in the present case no technical grounds will be relied upon in the disposition of any of the errors assigned. They all relate to the exclusion of testimony as to assays taken from the Childe Harold lode long subsequent to the issuance of the placer patent, to the existence of certain other locations west of the Morning Star lode in 1878, and to the admission of testimony as to the value of mineral ore found on the Morning Star lode location, and as to the percentage of mineral in the ore necessary to pay expenses at that time, etc. The determination of the principles which should govern courts in deciding the main question as to what constitutes a "known lode" under the provisions of the statute will necessarily dispose of all of these assignments of error upon their merits.

The remaining specifications, from 21 to 30, inclusive, are principally directed against the views expressed by the court in its opinion upon the merits of the case. They can all properly be grouped together, and require no separate review.

We shall not stop to inquire whether any of the reasons expressed by the court were irrelevant or erroneous. The point to be decided is whether the conclusions arrived at are sustained by the evidence and the law. *Sullivan* v. *Mining Co.*, 143 U. S. 431, 12 Sup. Ct. 555.

Is the decree of the court correct? Before proceeding to discuss the controlling question, it is proper to state that appellants are not claiming any title under the Morning Star lode location. Their application for a patent was made for the Childe Harold lode claim which was located after the issuance of the patent for the placer claims. Appellants, however, argue that the placer patent as to the west 730 feet of the Morning Star claim is void, for the reason that at the time of the application for the placer patent the west

730 feet of the Morning Star was property which was withdrawn from sale by the United States; that any patent purporting to convey any portion of the ground was an absolute nullity; that the Noyes placer application did not include the Morning Star lode; that neither said application nor the patent could include the said 730 feet of the Morning Star lode; that the title thereto remained in the government, in trust for the claimants under the existing location of the lode claim and their assigns, to be perfected upon the performance by them of the acts required by law. This argument is based upon the assumption that by a mere location of a quartz lode the ground is withdrawn from sale, independent of the question whether a lode is discovered or known to exist. If the Morning Star was a valid and subsisting location at the time of the issuance of the patent to the Noyes placer claims, an important and interesting question would be presented as to whether, in a case like the present, the patent could be collaterally assailed. The law is well settled that a mining claim that has in all respects been fully perfected under the requirements of law is property in the fullest sense of that term, and therefore, during the time of its valid existence as such, would not be subject to the disposal of the government to other parties. *Belk* v. *Meagher*, 104 U. S. 279, 283; *Noyes* v. *Mantle*, 127 U. S. 348, 353, 8 Sup. Ct. 1132, 1134. But the fact is, as appears from the testimony in the record, that the Morning Star lode claim had been abandoned prior to the time of the issuance of the patent to the Noyes placer claims. This being true, it follows that the land embraced in the placer patent was, at the time of the issuance of the patent, a part of the public domain, which the government had the power to sell and dispose of. This brings us to a consideration of the controlling question in the case.

Section 2333 of the Revised Statutes reads as follows:

"Where the same person, association or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section 2320, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof."

In the application for the patent of the Noyes placer claim no statement was made that it included any vein or lode within the boundaries of the placer ground. The question, therefore, is whether a vein or lode was at that time known to exist within such boundaries. What must be proven in order to establish the fact that a vein or lode was "known to exist," within the meaning of those words as used in the statute? When can it be said that a vein or lode is known to exist? Was there a known lode or vein within the boundaries of the Noyes placer claims at the time of the application for a placer patent? There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the intent and meaning of different sections of the Revised Statutes: (1) Between miners who have located claims on the same lode, under the provisions of section 2320; (2) between placer and lode claimants, under the provisions of section 2333; (3) between mineral claimants and parties holding town-site patents to the same ground; (4) between mineral and agricultural claim-

ants of the same land. The mining laws of the United States were drafted for the purpose of protecting the bona fide locators of mining ground, and at the same time to make necessary provision as to the rights of agriculturists and claimants of town-site lands. The object of each section, and of the whole policy of the entire statute, should not be overlooked. The particular character of each case necessarily determines the rights of the respective parties, and must be kept constantly in view, in order to enable the court to arrive at a correct conclusion. What is said in one character of cases may or may not be applicable in the other. Whatever variance, if any, may be found in the views expressed in the different decisions touching these questions arises from the difference in the facts and a difference in the character of the cases, and the advanced knowledge which experience in the trial of the different kinds of cases brings to the court. Mr. Justice Field, in a dissenting opinion in *Iron Silver Co.* v. *Mike & Starr M. Co.*, 143 U. S. 394, 423, 12 Sup. Ct. 543, 552, after announcing certain principles, said:

> "If there be any variance between these views and those expressed in *Mining Co.* v. *Reynolds*, 124 U. S. 374, 384, 8 Sup. Ct. 598, as to the manner in which knowledge of the existence of a lode within the boundaries of a placer claim may be obtained, it is because of a more careful consideration of the subject in later years than formerly, and of larger experience in mining cases."

The fact is that there is a substantial difference in the object and policy of the law between the cases where the determination of the question as to what constitutes the discovery of a vein or lode between different claimants of the same lode under section 2320, on the one hand, and a "lode known to exist" within the limits of a placer claim at the time application is made for a patent therefor under section 2333, in the other. As was said in *U. S.* v. *Iron Silver M. Co.*, 128 U. S. 673, 680, 9 Sup. Ct. 195, 198:

"The amount of land which may be taken up as a placer claim and the amount as a lode claim, and the price per acre to be paid to the government in the two cases are different. And the rights conferred by the respective patents, and the conditions upon which they are held, are also different. Rev. St. §§ 2320, 2322, 2325, 2333; *Smelting Co.* v. *Kemp*, 104 U. S. 636, 651; *Mining Co.* v. *Reynolds*, 124 U. S. 374, 8 Sup. Ct. 598."

The question as to what constitutes a discovery of a vein or lode under the provisions of section 2320 of the Revised Statutes has been decided by many courts. All the authorities cited by appellants are referred to in *Book* v. *Mining Co.*, 58 Fed. 106, 121. The liberal rules therein announced are substantially to the effect that when a locator of a mining claim finds rock in place containing mineral in sufficient quantity to justify him in expending his time and money in prospecting and developing the claim, he has made a discovery within the meaning of the statute whether the rock or earth is rich or poor, whether it assays high or low, with this qualification: that the definition of a lode must always have special reference to the formation and peculiar characteristics of the particular district in which the lode or vein is found. It was never intended that in such a case the courts should weigh scales to determine the value of the mineral found as between a prior and subsequent locator of a mining claim on the same lode.

But in construing the provisions of section 2333 it is evident that other questions are to be taken into consideration. This section of the statute was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying $5 an acre for that portion of the ground, and $2.50 an acre for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration

that the owner of the placer claim has no right of possession, by virtue of his patent for the placer ground, to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove, if it is not known to exist at the time of the application the patent for the placer claims will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as "known veins or lodes;" that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Mining Co.* v. *Reynolds,* 124 U. S. 374, 383, 8 Sup. Ct. 598, 603; *U. S.* v. *Iron Silver M. Co.,* 128 U. S. 674, 683, 9 Sup. Ct. 195, 199; *Iron Silver M. Co.* v. *Mike & Starr M. Co.,* 143 U. S. 394, 404, 424, 12 Sup. Ct. 543, 553; *Sullivan* v. *Mining Co.,* 143 U. S. 431, 12 Sup. Ct. 555; *Brownfield* v. *Bier* (Mont.) 39 Pac. 461, and authorities there cited. This construction as to the meaning of section 2333 is, in our opinion, founded in reason, and is in harmony with the construction given by the courts to the other sections of the statute relative to the rights of locators of mining claims upon the public lands of the United States. But, in any event, the rule, as above stated, is now too well settled to be departed from.

The decisions of the supreme court upon controversies arising between mineral claimants on one side and parties holding town-site patents on the other are applicable to this class of cases. The doctrines therein announced are directly in line with the cases we have referred to. In such character of cases the court has repeatedly declared that, under the acts of congress which govern such cases, in order to except mines or mineral lands from the operation of a town-site

patent, it is not sufficient that the lands do in fact contain minerals, or even valuable minerals, when the town-site patent takes effect; but they must at that time be "known" to contain mineral of such extent and value as to justify expenditures for the purpose of extracting them; and, if the lands are not known at that time to be so valuable for mining purposes, the fact that they have once been valuable, or are afterwards discovered to be still valuable, for such purposes, does not defeat or impair the title of persons claiming under the town-site patent. *Deffeback* v. *Hawke,* 115 U. S. 393, 404, 6 Sup. Ct. 95, 101; *Davis* v. *Weibbold,* 139 U. S. 507, 525, 11 Sup. Ct. 628, 635; *Dower* v. *Richards,* 151 U. S. 658, 663, 14 Sup. Ct. 452, 454.

It is argued by appellants that *Noyes* v. *Mantle, supra,* "is identical as to facts and dates with the case at bar," and that upon the authority of that case the judgment in this should be reversed. The owners of the Morning Star location did not file any protest to the application for the placer patent. The plain inference and presumption is that at that time they believed the Morning Star was valueless as a lode claim. The presumptions, if any are to be indulged in, are all in favor of the validity of the patent. This case differs from *Noyes* v. *Mantle* in the fact that the evidence clearly shows that the Morning Star was abandoned before the placer patent was issued. The owners quit work thereon, and, after they left it, they never bothered themselves about it. While it is true that the provisions of section 2333 were intended to apply only to lodes or veins which had been located, and the laws in respect thereto had been fully complied with, so as to become the property of the locators (*Sullivan* v. *Mining Co.,* 143 U. S. 431, 12 Sup. Ct. 555, and authorities there cited), yet this principle should not be, and never has been, extended to a mere location of an alleged vein or lode of the character as shown by the evidence in this case, so as to withdraw the ground covered by the location from the operation of

the provisions of the statute where the location has been abandoned before the placer patent is issued. The discovery shaft and the other shafts sunk upon the Morning Star were not within the limits of the patented placer claims. There had not been any developments made showing that the mineral-stained rock therein found extended into the patented placer ground, or that the ore found in the shafts was sufficient to justify the expenditure of time, labor, and money in developing the same. In *Iron Silver M. Co.* v. *Mike & Starr M. Co., supra,* the court said:

"It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute."

And in the further discussion of that case the court said:

"The amount of the ore, the facility for reaching and working it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working."

Within this principle it is manifest that the trial court did not err in admitting testimony as to the value of the ore disclosed in the shafts of the Morning Star. The evidence to the effect that, long after the issuance of the placer patent, developments were made on the Childe Harold lode of such a character as tended to prove the existence of a lode extending into the placer ground was wholly immaterial and irrelevant.

In *Sullivan* v. *Mining Co., supra,* the court said:

"A placer patent conveys to the patentee full title to all lodes or veins within the territorial limits not then known to exist. So it matters not what developments or discoveries were made by these defendants after the issue of the patent. Nothing then disclosed could limit the effect of the patent, or except from its scope any vein or lode within its territorial limits."

The same principle is announced in several of the other authorities herein referred to.

From whatever standpoint this case can be viewed, under the evidence presented at the trial, we are of the opinion that the fact as found by the court that there was no lode or vein known to exist within the boundaries of the placer claims at the time of the application for the placer patent is fully sustained, and justifies the conclusions reached by the court.

The judgment and decree of the circuit court is affirmed, with costs.

RICHARD BLAKE v. EDWARD LOBB'S ESTATE.

(110 Michigan 608; 68 N. W. 427. Supreme Court. Oct. 6, 1896.)

[1]**No ore found after search.** A lease of land "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore which is or which hereafter may be found on, in, or under said land," at a specified annual rent, to be considered in the adjustment of royalties on ore removed, presupposes the existence of merchantable ore, and if, after reasonable efforts on the part of the lessee, ore is not found in minable quantities, the lease fails, and no rent can be collected. *Gribben* v. *Atkinson*, 64 Mich. 651, followed.

Error to Circuit Court, Marquette County; John W. Stone, Judge.

Claim by Richard Blake against the estate of Edward Lobb, deceased, for rent. On appeal to the circuit court from an order of the probate court disallowing the claim, judgment was rendered for defendant, and claimant brings error. Affirmed.

BALL & BALL, for appellant.

[1]*Hewitt Co.* v. *Dessau Co.* (Mich.) 89 N. W. 365. *Williams* v. *Guffy*, 18 M. R. 478.

Parties agreed to work a quarry so long as it could be profitably worked; *Held*, that it could not be terminated before the quarry was exhausted. *Treat* v. *Hiles*, 81 Wis. 280, 50 N. W. 896.

Where lease provides for right to quit if mine exhausted, burden of proof on the lessee. *Wilson* v. *Beech Creek Co.* 161 Pa. 499; 29 Atl. 100.

Lessee paid an annual rental to avoid forfeiture. Finally he sunk and found there was no coal at all. *Held*, that he could not recover back his rents. *Bloomfield Co.* v. *Tidrick*, 99 Ia. 83; 68 N. W. 570.

Mutual mistake as to existence of workable vein is ground for rescission. *Bluestone Co.* v. *Bell*, 38 W. Va. 297; 18 S. E. 493. *Fritzler* v. *Robinson*, 17 M. R. 105.

HAYDEN & YOUNG, for appellee.

MONTGOMERY, J. On the 1st of January, 1892, claimant was the owner of an interest in certain mining lands in the county of Marquette, and joined with his co-owners in making a lease to the deceased and others by which the owners—

"In consideration of the sum of one dollar to them paid by the parties of the second part, the receipt whereof is hereby acknowledged, and in further consideration of the covenants and conditions herein contained, to be kept and performed by the parties of the second part, do hereby let, lease, and demise to the parties of the second part, for the term of 20 years, the said tracts of land, containing 160 acres, which premises are leased to the said parties of the second part for the purpose of exploring for, mining, taking out, and removnig therefrom the merchantable iron ore which is, or which hereafter may be found on, in, or under said land, together with the right to construct all buildings, make all excavations, openings, drains, ditches, railroads, wagon roads, and other improvements upon said premises which are or may become suitable or necessary for the mining and removing of iron ore from said premises."

There was also a provision that

"The parties of the second part shall have the right at any time to terminate this agreement, in so far as it requires the parties of the second part to mine ore on said land, or to pay a royalty therefor, by giving sixty days' written notice to the parties of the first part, either in person or by mail, and thereupon the foregoing lease and demise shall terminate, and all arrearages and sums which may be due under the same up to and including the date of its determination, as set forth in such notice, shall be paid upon settlement and adjustment thereof."

The undertaking of the deceased was as follows:

"The parties of the second part, in consideration of the said demise, hereby covenant and agree to and with the parties of the first part, to pay to the parties of the first part or

their assigns, in manner hereinafter designated, as rent for the lands hereby demised, the sum of six thousand dollars per annum, payable, for the first year, on the first day of January, 1893, and thereafter quarter-yearly on the days hereinafter specified for the payment of royalty, and also such additional sums as may accrue for royalty on ores removed, as hereinafter set forth (said royalty being treated as rent), to the several parties of the first part, or their assigns: *Provided,* that all the royalties paid on iron ore mined and removed from said premises during any year ending December 31st shall apply, so far as necessary, or so far as the same will go, to the satisfaction and payment of said rent for such year, and if, in any year, the royalty on iron ore so mined and removed by said second parties shall not amount to six thousand dollars, the rent so paid by said second parties in excess of the amount of such royalty, shall be applied towards the payment of any excess over six thousand dollars and may be payable on account of royalties in any subsequent year."

The parties of the second part also undertook to "take out and remove as much iron ore as can be mined and removed profitably to said parties, paying therefor at the quarter dates aforesaid, and at the rates aforesaid, for each and every ton of ore so mined and removed."

The lease in question was terminated by notice given August 2, 1893, and this action was brought to recover rent under the lease, accruing prior to said notice. The defendant offered testimony tending to show that no iron ore in minable quantities existed in the premises, and the circuit judge charged the jury that, if it was found that there was no iron ore there—no merchantable iron ore—on the property in sufficient quantities to make it pay, and that the deceased used all reasonable efforts to ascertain that, and made the proper excavations to discover any iron ore, the plaintiff could not recover. The circuit judge relied on the case of *Gribben v. Atkinson,* 64 Mich. 651, 31 N. W. 570. It is contended by the plaintiff that that case is distinguishable from this, in that in that case the payments to be made were designated as

"royalty," while in the present case they are spoken of as "rent." The circuit judge was of the opinion that this does not distinguish the cases, in determining the intent of the parties, and we think in this there was no error. In that case, as in this, the lease was made for the purpose of exploring for, mining, and taking out merchantable iron ore, and it was held that the lease, by its terms, presupposed the existence of ore, and that upon its appearing that no such ore was to be found, the purpose of the lease failed and the defendant should not be charged with the consideration. In that case, as in this, there was a specific engagement to pay a specified sum at all events, and while, in that case, it was called "royalty" and in this case termed "rent," the agreement was, in both cases, based upon the supposition that ore existed. We think this idea was no more clearly expressed in that lease than in this. The scheme of a mining lease implies that ore exists in minable quantities, and, if it does not, the scheme fails. *Iron Co.* v. *Wright,* 32 N. J. Eq. 248. See, also, *Muhlenberg* v. *Henning,* 116 Pa. St. 138, 9 Atl. 144.

The judgment will be affirmed, with costs.

GRANT, HOOKER and MOORE, JJ., concurred. LONG, C. J., did not sit.

[1]BAILEY v. BOND.

(77 Federal 406. Circuit Court of Appeals, Ninth Circuit. October 26, 1896.)

[2]**Right to work implies right to proceeds.** The term "working a mine," as used among miners, implies, not merely the right to explore and develop, but the right to extract and appropriate ores as the owner himself might do.

Instance. Power to work limited. Commission not earned. Defendant agreed to pay to plaintiff a certain sum when, he, plaintiff, should procure from the owners a bond on a certain mine on certain terms, among which should be the right to enter into possession and work during the life of the bond. Plaintiff procured a bond limiting the right to sell ore to a limited amount, all mining to be done under owners directions and proceeds kept in bank: *Held*, That plaintiff had procured no such bond as defendant was bound to accept.

Failure to make specific objections to a contract tendered—mere silence in such regard—is no waiver of valid grounds for objection.

In error to the Circuit Court of the United States for the District of Washington.

GEORGE TURNER and E. C. HUGHES, for plaintiff in error.

ANDREW F. BURLEIGH, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

KNOWLES, D. J. S. S. Bailey, plaintiff in error, commenced this action against the defendant in error to recover

[1] Cited in Snyder, § 1360.

[2] When a lease is contracted for, its minor covenants may be found by proof of the custom of the district. The lessor cannot insist upon a covenant for a deep shaft to be sunk whether in ore or barren ground, nor reserve to lessor the handling of the ore. *Cochrane* v. *Justice M. Co.* 16 Colo. 415; 26 Pac. 780.

Where minerals have been reserved surface owner cannot make good his contract to convey a fee simple title. *Adams* v. *Reed*, 11 Utah 480; 40 Pac. 720.

of him the sum of $251,250. The complaint sets forth, in form, two causes of action.

In the first cause of action it is set forth that John J. Hennessy, William M. Hennessy, John L. Seaton, Frank Flint, and John M. McGuigan were the owners of five certain mining claims situate in the West Kootenai district, in the province of British Columbia, in what is known as the "Kaslo-Slocan Mining Region;" that on the 18th day of January, A. D. 1892, plaintiff and defendant entered into an agreement in writing whereby the said defendant did authorize and empower this plaintiff to at once undertake and procure for defendant a bond or agreement for a deed to the said mining claims, from the owners thereof, upon the following terms, to wit: First, the price of said properties was not to exceed the sum of $300,000, unless thereafter agreed to in writing by said defendant; Second, the said defendant was not to be required to pay more than $25,000 in cash when said bond was executed and delivered to him; Third, the remainder of said purchase price over and above the amount of said first cash payment was to be paid on or before the 15th day of September, 1892, unless otherwise agreed to by defendant in writing; Fourth, the said defendant should claim the right, at any time after the delivery of said bond, and after the making of said first cash payment, to enter into possession of said properties, and work the same, pending the continuance of said bond. The fifth provision provides for a deed upon the payment of the purchase price of said mining properties, when the defendant shall have exploited the same to his satisfaction, during the continuance of the bond.

In said contract the defendant agreed, on his part: First, that upon the procuring of said bond, and the delivery of the same to him, he would accept the same, and immediately pay the first cash payment provided in said bond, not to exceed $25,000; Second, that he would at once assign by a separate instrument in writing, to this plaintiff, an undivided one-

fourth interest in said bond or agreement, free from any charge or expense; Third, that if he concluded to take said properties, he would make all payments named in said bond or agreement, and plaintiff should not be held liable or compelled to pay any portion of said payments; Fourth, that, upon the execution by the owners of said mining properties to defendant of a deed to said properties, defendant would upon request, make to plaintiff, free of any charge or expense, a deed conveying the same title to said properties received by him, for an undivided one-fourth interest in said properties.

Plaintiff alleges: That he did procure from said owners of said property a bond or agreement for defendant, duly executed, sealed, and acknowledged, for a deed to said mining properties. That a copy of said bond or agreement is attached to complaint, marked "Exhibit B," and made a part thereof. That he did deliver said bond or agreement to defendant, and demanded of him that he duly assign by a separate instrument in writing, to plaintiff, an undivided one-fourth interest in said bond or agreement. That defendant refused to accept the said bond or agreement, and to pay the first cash payment therein provided to be made, and refused to assign to plaintiff said one-fourth interest therein, and failed and refused to keep and perform any of the conditions in said agreements marked "Exhibits A and B." That defendant alleged as an excuse for his refusal to accept the said bond or agreement, and to carry out the other terms of said contract with plaintiff, that the said bond or agreement deprived him of the right to enter into possession of said properties, and work the same, pending the continuance of said bond or agreement.

That the mining properties were of great value, namely, $1,000,000, and that plaintiff has been damaged by the failure of defendant to perform said agreement with him in the sum of $250,000.

The second cause of action is based upon a provision of the contract between plaintiff and defendant, that in case

plaintiff would procure said bond or agreement from said owners of said mining properties, he (the defendant) would pay plaintiff one-half of all reasonable expenses required to procure the same, including traveling expenses; that he procured the bond or agreement named in the said contract; that his reasonable expenses were the sum of $2,500; that defendant is liable for $1,250 of this sum. Defendant demurred to each of said causes of action on the ground that the same did not state a cause of action. There was also a demurrer to the second cause of action, based upon the ground that the court had no jurisdiction of the same because the amount involved therein did not equal the sum of $2,000. This last point is not presented in the brief of defendant. The court sustained this demurrer and gave judgment. The cause is brought to this court on writ of error.

The first question for consideration is, does the complaint show that plaintiff in error complied with his portion of said contract, as set forth above, and does the complaint show that defendant in error failed to comply with his part thereof? The plaintiff was to procure a bond or agreement which would give the defendant the right to enter into the possession of the mining ground described therein, and work the same. This in effect, would be a lease giving the defendant the right to enter upon and work said mining property. There was a consideration for this lease, of $25,000, paid on the purchase price, which was to be forfeited if defendant failed to take the property. The question is, did the plaintiff procure such an agreement or bond? The instrument obtained, and which is attached to the complaint and marked "Exhibit B," and made a part of the complaint, provides:

"And it is further mutually covenanted and agreed that the party of the second part shall have the right to enter upon and take possession of all the premises aforesaid immediately upon the execution of this instrument by said first parties, and retain possession thereof until said September 15th, 1892, and that he shall have the right to

work the mines thereon, and extract ore therefrom, at his own expense; and said second party covenants not to remove any of said ore from the dump of said mines, respectively, until after the full payment of the purchase price according to the terms thereof, except not to exceed fifty tons thereof for the purpose of shipment and sale, and to do all mining upon said properties in such workmanlike manner as shall be approved by S. S. Bailey. Said second party further agrees that immediately upon receiving the proceeds from the sale of said fifty tons of said ore, or any part thereof, to deposit the net proceeds thereof in Traders National Bank of Spokane Falls, Washington, to the credit of the first parties."

Was this the possession and right to work said mining property stipulated for by defendant in his contract with Bailey? Possession of real property implies something more than the mere right to enter upon the same, and look at the same, or occupy the same. Possession of real property implies the right to occupy and enjoy the same. *Redfield* v. *Railroad Co.*, 25 Barb. 54-58. In the case of *Sullivan* v. *Sullivan*, 66 N. Y. 37, the court says:

"Possession is something more than mere right or title, whether to a present or future estate. It implies a present right to deal with the property at pleasure, and to exclude other persons from meddling with it."

"The possession of land is the holding of, and exclusive exercise of dominion over it." *Booth* v. *Small*, 25 Iowa 177. Am. & Eng. Enc. Law, tit. "Possession."

In 1 Washb. Real Prop. 436, a lease is thus defined:

"An estate for years, as understood in this chapter, is one that is created by a contract, technically called a 'lease,' whereby one man called the 'lessor' lets another, called the 'lessee,' the possession of lands or tenements for a term of time fixed and agreed upon by the parties to the same."

See, also, 4 Greenl. Cruise, marg. p. 54.

What the defendant wanted was, for a term of months, the possession of this property, and the instrument which would give it is termed a "lease." After stating that the terms of

the lease are subject to contract, and may be varied, that author again says:

"The lessee does not own the soil and freehold, and has a limited property in it. But, within these limits, he is the owner of the possession and profits of it, and of all the uses that can be made of it during the continuance of his term. . . . The use and products of the premises are his, as owner. Thus, a tenant, whether for life, years, or a single year, may work an open mine on the premises, or a quarry, and the products of the mine are a part of the profits of the estate to which he is entitled."

The possession for which defendant stipulated in his agreement with plaintiff was not that expressed in the agreement with the owners of the mining premises named in the said agreement with them. By the terms of that agreement, defendant might dig out the ores in said premises but they were not to belong to him until after the premises were fully paid for. The net proceeds of the ore he could remove or sell was to be deposited to the credit of said owners. In other words, the product of these mining properties derived from the explorations thereof by defendant were not to belong to defendant. The fact that this was mining property to be leased should be considered. In such a case the question whether the mines were opened or unopened would be immaterial. To make the nature of the lease defendant asked more explicit, the right to work these mining properties was to be given with the possession. What does the term "work" imply, when applied to a mine? The term seems to be one long in use. In 1 Greenl. Cruise, marg. p. 118, this language is used: "The lord king has said that a tenant for life of coal mines may open new pits or shafts for working the old veins of coals, for otherwise working the same mine would be impracticable. Here, undoubtedly, the term "working" is used in the sense of extracting ores and appropriating them. In 1 Washb. Real Prop. 287, in treating of the assignment of dower, it is said of a mine, "If opened, it may be used and worked as part

of the dower for her own exclusive use." Again in the same volume (467), it is said the general rights of lessees of lands in which there are minerals are these: "If there is an open mine on the premises, they may work it." In both of these statements it will be seen that the term "work," as applied to a mine, means the exploring or digging for ores and the appropriation of the same when found. The attorneys for the defendant have collected and cited in their brief a number of cases in which the word "work" is used in the same sense. *Bicknell* v. *Mining Co.*, 62 Fed. 432; *Bank* v. *Bissell*, 4 Fed. 701; *Real Del Monte M. Co.* v. *Pond M. Co.*, 23 Cal. 83; *Buck* v. *Lodge*, 14 Morr. Min. R. 623; 15 Am. & Eng. Enc. Law, 588. In general, among miners, the phrase "working a mine" means more than exploring or developing a mine. The right to work a mine is not simply the right to explore or develop a mine, but to do in regard to a mine what an owner might do. The agreement obtained by plaintiff limited the work to the exploration of the mining ground. In this particular the agreement was not of the character defendant stipulated for. While all work or exploration of the mining property would have to be done in a workmanlike manner, defendant did not stipulate as to leaving this question to be determined by plaintiff.

In other particulars, there were additions made in the agreement for the purchase of the ground, other than those stipulated for in the contract between plaintiff and defendant. It is contended that, by not placing his refusal to accept the agreement presented to him upon these grounds, he waived them. There was no consideration for any such waiver. The defendant made no declarations in regard to them which could in any way have misled the plaintiff. He was simply silent as regards them. Under these circumstances, I do not think the charge that he waived them can be maintained. The following authorities support this view: *Tufts* v. *McClure*, 40 Iowa, 317; *Holdsworth* v. *Ticker*, 143 Mass. 374, 9 N. E.

764; *Friess* v. *Rider,* 24 N. Y. 367; *Ripley* v. *Insurance Co.,* 86 Am. Dec. 362; *Railroad Co.* v. *Boestler,* 15 Iowa, 559; *Railway Co.* v. *Rust,* 19 Fed. 245. It must always appear in some way that a party intended to waive the performance of a provision in a contract, or his conduct must be such as would estop him from insisting upon its performance. 28 Am. & Eng. Enc. law, tit. "Waiver," 531. The facts showing waiver should be pleaded. In this case all that is pleaded is that the defendant objected to the agreement because it did not give him the right to the possession of the mining property, and the right to work it. This does not sufficiently show that the defendant waived the other objections to the agreement. Without insisting upon the point that there was no waiver of the other objections to the agreement, it is apparent that the objection made to the agreement was valid. In the particular pointed out, the agreement did not correspond with the stipulation in the contract between plaintiff and defendant.

Plaintiff having failed to comply with the said contract, has no cause of action against defendant. The demurrer was properly sustained as to both causes of action.

The judgment of the court below is affirmed, with costs.

HARKRADER v. CARROLL.

(76 Federal 474. District Court, District of Alaska. October 28, 1896.)

[1]**Possessory rights in mining claims may be divested** (1) by sale or gift, (2) by forfeiture, or (3) by abandonment.

[2]**When intention to abandon and a surrender** of the claim unite, abandonment is complete, and operates instanter to restore the title to the United States.

Where sale is made after abandonment, the vendee or grantee takes no title.

[3]**Quitting the claim and removing** from the district on an indefinite expectation of regaining lost health, leaving the mine without work or representation amounts to abandonment.

[4]**Presumption in aid of patent.** The presumption of the law is in favor of the regularity of all proceedings in the land office anterior to the issuance of the patent.

Diverse positions. A party who is seeking to obtain title under a patent granted to another cannot, at the same time, dispute its validity.

Bill in equity to declare defendant trustee and compel him to convey.

J. F. MALONEY, (JOHN TRUMBULL, on brief), for plaintiff.

JOHNSON & HEID, for defendant.

DELANEY, District Judge. On the 1st day of November, 1894, letters patent were issued by the United States to the defendant for a certain lode mining claim, known as the "Monitor," situated in Silver Bow basin, Harris mining district. The claim was located by William Moore and Thomas Mooney on the 4th day of June, 1881. Application for the

[1] *Richardson* v. *McNulty*, 1 M. R. 11. See *Trevaskis* v. *Peard*, 18 M. R. 353 and notes.

[2] *Carter* v. *Bacigalupi*, 83 Cal. 187; 23 Pac. 362. *Niles* v. *Kennan*, 27 Colo. 502; 62 Pac. 360. *Migeon* v. *Montana Co.* 18 M. R. 446.

[3] *Venture Co.* v. *Fretts*, 17 M. R. 543. *Derry* v. *Ross*, 1 M. R. 1.

[4] *Carson City Co.* v. *North Star Co.* 83 Fed. 658; 19 M. R.—.

patent was made on the 23d day of August, 1890, and a receiver's receipt was issued to defendant on the 27th day of July, 1892. After the application was filed, and before the certificate was issued, to wit, on the 24th day of January, 1891, Moore executed a deed to the plaintiff for an undivided one-half of the claim. This bill is brought for the purpose of having defendant declared a trustee for plaintiff of said undivided one-half, and to compel a conveyance thereof. The issue of abandonment is raised by the pleadings, and all the material facts except such abandonment have been stipulated by the parties, leaving that issue the only question of fact to be tried. It was further stipulated by the parties "that, if the court finds, from the evidence in the case, that there was no abandonment, then plaintiff is entitled to the undivided one-half of the claim; but if the court finds from the evidence, that Moore had abandoned the claim, then defendant is the owner of all the land described in the patent."

Possessory rights in mining claims may be divested by sale or gift, by forfeiture, or by abandonment. No question of forfeiture is presented in this case by either the pleadings or the proof. The issue is one of abandonment, and, if there was an abandonment by Moore, occurring before the sale and conveyance from him to the plaintiff, then the latter can take no title thereunder. Abandonment is a matter of intention, and whenever the intention and an actual surrender of the claim are united, the abandonment is complete, and operates instanter to restore the title to the United States. Where a miner gives up his claim and goes away from it, without any intention of holding or repossessing it, and regardless of what may become of it, or who may appropriate it, an abandonment takes place, and the property reverts to its original status as a part of the unoccupied public domain. It is then open to location by the first comer, and, after others have acquired rights therein, no sale by the former locator, made subsequently to his abandonment, will convey any right or title to

his grantee, or in any way affect intervening rights; for the rights of the original locator having become wholly divested by abandonment, he has nothing to convey, and his grantee has nothing to take. *Derry* v. *Ross,* 5 Colo. 295; *Richardson* v. *McNulty,* 24 Cal. 339; *Davis* v. *Butler,* 6 Cal, 510; *French* v. *Manufacturing* Co., 23 Pick. 216; *McGoon* v. *Ankeny,* 11 Ill. 558; *Mallet* v. *Mining Co.,* 1 Nev. 188; *Bell* v. *Bed Rock Co.,* 36 Cal. 214; 1 Morr. Min. R. pp. 1, 7, 9, 11, 17, 45.

While lapse of time is not an essential element of abandonment, it may be a strong circumstance, in connection with others, to prove the intention to abandon. *Mallet* v. *Uncle Sam Co., supra.* The testimony in this case is undisputed that in 1882, about a year after the location of the claim, Moore left this mining district and territory, and has never since returned to the claim. Upon this point he testified as follows:

"Q. How long did you work the claim? A. I worked it from that date (meaning date of location) somewhere about nearly a year. Q. Where did you go then? A. I went away, sick and disgusted, out of the district. Q. Have you ever been upon the claim since? A. No sir; I never have. Q. Have you done or caused to be done any assessment work on that claim? A. I have not, sir. Q. Have you paid or caused to be paid for any labor on that claim since 1882? A. I have not, sir. Q. Was it your purpose, or was it not your purpose, to return to the Monitor claim after you had left it? A. The doctor told me it would take me from five to seven years to get well of my troubles, and then I gave up all hopes of returning to the claim."

If these facts do not constitute an abandonment, it is difficult to conceive what will. In a case decided by the Supreme Court of California, March 20, 1896, it was held that, where the owner of a mining claim, which was erroneously included in a sale under a decree of court, moved his effects from the claim, and absented himself for two years, allowing purchasers to work it without objection, although knowing that their title was invalid, and intending to claim it in case their

development rendered it profitable to do so, his acts constituted an abandonment. *Trevaskis* v. *Peard,* 18 M. R. 353. Assuredly the testimony in the case at bar goes a long way further towards establishing an abandonment than that in the case cited. In the present case the locator, Moore, left the claim in 1882, and never returned to it, or pretended to exercise any acts of ownership over it, until he executed the deed to the plaintiff in January, 1891, nearly nine years after he left the district. Aside from this, he testifies that, when he left, he gave up all hopes of returning to the claim. Applying the well settled rules of law to this state of facts, it seems impossible to reach any other conclusions than that the claim was abandoned by Moore in 1882; that whatever interest he acquired by virtue of his location was instantly lost upon such abandonment, and reverted to the United States; and that, at the time of making deed to plaintiff in 1891, he had nothing to convey.

While neither the pleadings nor the testimony, the patent excepted, disclose what became of his interest after it was restored to the United States by such abandonment, the presumption is in favor of the regularity of the proceedings in the land office prior to the issuance of the patent to the defendant, and that sufficient evidence was brought, and proper proceedings were had, before the land office, to authorize the granting of a patent to the defendant for the full claim. *Polk* v. *Wendell,* 9 Cranch, 87; *Minter* v. *Crommelin,* 18 How. 87; *Bagnell* v. *Broderick,* 13 Pet. 450; *Moffat* v. *U. S.,* 112 U. S. 24. In any event, the plaintiff here cannot inquire into the proceedings in the land office for the purpose of attacking the patent. As he is seeking to obtain title under the patent, he cannot be heard in this suit to deny or dispute its validity.

It follows, from these views, that the bill must be dismissed.

VIN E. WILLIAMS v. J. M. GUFFY ET AL.

(178 Pennsylvania 342; 35 Atl. 875. Supreme Court. Nov. 9, 1896.)

[1]**No rental on exhausted well.** Where a lease provided for an annual rental for each well after gas was found in paying quantities such rent ceases upon the exhaustion and abandonment of such well.

Appeal from Court of Common Pleas, Allegheny county.

Action by Vin E. Williams against J. M. Guffy and A. W. Mellon to recover rent alleged to be due under a lease to defendants by Gottlieb Minsinger, who afterwards conveyed the leased land to plaintiff. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The lease provides that "in consideration of the stipulations, rents, and covenants hereinafter contained, on the part of the said parties of the second part, their executors, administrators, and assigns, to be paid, kept, and performed, has granted, demised, and let unto the said parties of the second part, their executors, administrators, and assigns, for the sole and only purpose of drilling and operating wells, and storing, transporting, and conveying petroleum oil or gas through, over, and from all that certain tract of land situated in Hempfield township, Westmoreland county, and state of

[1]*Indianapolis G. Co.* v. *Teters*, 18 M. R. 391. *Blake* v. *Lobb's Est.*, 18 M. R. 462.

Prosecuting a well to success means the production of oil or gas in quantities capable of division between the parties. *Kennedy* v. *Crawford*, 138 Pa. 561; 21 Atl. 19.

Obligation to work while oil is produced in paying quantities, means paying to the lessee. *Young* v. *Forest Co.* 194 Pa. 243; 45 Atl. 121.

Covenant to pay royalty on all coal left unmined means only coal which could be won and got by ordinary processes. *Gaines* v. *Virginia Co.* 124 Ala. 394; 27 So. 477.

Pennsylvania; * * * to have and to hold the said premises, for the said purpose only, unto the parties of the second part, their executors, administrators, and assigns, for, during, and until the full term of twenty (20) years next ensuing the day and year above written." After providing for the delivery, in pipe lines, of the one-eighth of the petroleum oil discovered, the lease provides: "It is further agreed that if gas is obtained in sufficient quantities, and utilized, the consideration in full to the party of the first part shall be five hundred ($500) dollars for each and every well drilled on the premises herein described, per annum, payable within sixty days after completion of such well, and thereafter yearly in advance, at Third National Bank, Pittsburg, Pa." After providing for the completion of one well within six months from the date of the lease, and, in case of failure, to pay $73 per annum in full consideration for such yearly delay, until the well should be completed, and providing that failure to complete one well within said period, or pay the above rental, "renders this lease null and void, and to remain without effect between the parties hereto," the lease provides: "If oil and gas, or neither, is found on this property within 2 (two) years from date, then this lease to expire and be of no effect." The defendants did commence and complete one well on the premises, and found gas, within two years from the date of the lease, in sufficient quantities, and utilized the same, and continued to produce and utilize gas from the well so completed, from the time of completion thereof until the 1st day of July, 1893. And plaintiff claims that, by reason thereof, there became due and payable to the plaintiff on the 21st day of November, 1886, and yearly thereafter, on the 21st day of November, the sum of $500. The defendants paid the rentals due under said lease which were payable thereon November 21, 1889, November 21, 1890, and November 21, 1891, but failed to pay any further rentals; and this suit was for the rentals payable November 21, 1892, and November 21, 1893,

amounting to $1,000. No oil was found on the premises. In July, 1892, the defendants ceased to operate said well, claiming that the gas was exhausted. The property still remained in possession of the defendants until January or February, 1893, when it was dismantled, the property of defendants removed from the premises, and the lease tendered back to the plaintiff, which he declined to accept.

The following points were submitted in writing: "Defendant requests the court to charge the jury that, under the evidence in this case, their verdict must be for defendants." Refused.

"The plaintiff asks the court to charge that, under all the evidence in the case, the plaintiff is entitled to a verdict for all the rental claimed in plaintiff's statement, with interest to date." Refused.

The charge of the court is as follows:

"This is an action growing out of a lease which in this region is of a kind very common,—an agreement giving to the lessee or his assigns the right to drill for oil or gas, providing that wells shall be drilled within a certain time, or that in the event of failure to do so, that certain penalties should ensue. It is not with such a clause of the lease that we have to do in this case. A well was drilled on this farm, and gas was produced in quantities which held the parties to have the well equipped for the utilization of the gas, and it was connected with the pipe lines and used for a time. The rent or amount of money that was to be paid annually for the use of this well was fixed by this clause in the lease: 'It is further agreed that if gas is obtained in sufficient quantities, and utilized, the consideration in full to the party of the first part shall be $500, for each and every well drilled on the premises herein described, per annum, payable within sixty days after completion of such well, and thereafter, yearly, in advance, at the Third National Bank, in the city of Pittsburg.' Under the terms of this lease, the parties had a right to drill for oil

or gas. Under the terms of this lease, if they found gas, they were to pay for the wells, under this clause, $500 per annum. The first payment had to be made within 60 days after the completion of the well; and for subsequent years they had to pay $500 for each well, in advance. It was for that well. It was not for rent of the premises generally. It was for the use of that well. The rental for this farm, under this lease, or the amount that was to be paid under this agreement, was not limited to the payments made for these wells used for the purpose of gas. If the parties had gone on after the gas had been discovered, and discovered a profitable oil well, the owner of the farm would still have been entitled to his royalties, under another clause in this lease, in oil. This was, then, an agreement to pay for the use of the wells,—the gas wells. The prerequisite to the payment on any gas well was that gas should be found in sufficient quantities to utilize. This one well was drilled, and it was utilized. No others were drilled, and it is only with this well which you have to do. The rental for this well was paid down to November, 1891; and in November, 1891, a payment of $500 was made, being the payment in advance for the year terminating in November, 1892. Down until that time there is no question. The rent was paid to November, 1892. Was this well utilized after that time? The defendant has undertaken to show you that the gas ceased to be used from that well in June or July, 1892, and that its connection with the pipe lines—that is, the means by which it was carried to the market—had been severed, and the connecting pipe taken out, which led over to another farm, some time in July, 1892. They say that at that time they ceased to use it, and that it was their intention permanently to do so. The severance of the connection and the taking up of the line leading to the other farm ended its use as a gas well permanently. In December the tubing was directed to be drawn, and, in the following spring some time, the derrick was taken down, and

the tubing removed from the premises, and there is no evidence that anything has been done on the farm since. If you believe the testimony of the witnesses in the case, the well had no gas in it whatever that was discernible when the tubing was drawn.

"Now, gentlemen, if these defendants, or those acting under the lease because of any assignment, in July, permanently ceased to use this as a gas well, then there can be no recovery in this action. If they simply suspended the use of it, intending to resume, and continued to hold it thus until December, experimenting with it in the hope or expectation that the gas would return in sufficient quantities, and so continued down until December, when they found that the gas had departed altogether, then they would be liable for the rental of $500 coming due November 21, 1892, with interest from that date down to the present time. But in case they had permanently ceased its use before the 20th of November, and were not at that time holding it with the intention of holding it as a gas well, then there could be no recovery in this action. The defendants would have the right within a reasonable time afterwards, under this lease, to remove their casing and such other machinery as they had, in a reasonable manner. They would have a right to a reasonable time in which to get the property away, considering the nature of the property and the difficulty of taking it away.

"The learned counsel representing the plaintiff has requested the court to charge you 'that, under all the evidence in the case, the plaintiff is entitled to a verdict for all the rental claimed in plaintiff's statement, with interest to date.' This point is refused. The learned counsel representing the defendants has requested the court to charge you 'that under all the evidence in this case, the verdict must be for the defendants.' This point is refused. The question of fact is for you, gentlemen, and you will pass upon that under the evidence, as in any other case, finding in favor of the party to

whom the weight of the evidence belongs. You will take the case, gentlemen, and dispose of it."

To which charge of the court counsel for plaintiff requests an exception. Exception allowed, and bill sealed.

The assignments of error are as follows:

"The court erred in refusing to instruct the jury as requested by the plaintiff, which request was as follows: 'The plaintiff asks the court to charge that, under all the evidence in the case, the plaintiff is entitled to a verdict for all the rental claimed in plaintiff's statement, with interest to date.'

"The court erred in charging the jury as follows: 'Under the terms of this lease, if they found gas, they were to pay for the wells, under this clause, $500 per annum. The first payment had to be made within sixty days after the completion of the well; and for subsequent years they had to pay $500 for each well, in advance. It was for that well. It was not for rent of the premises generally. It was for the use of that well.'

"The court erred in charging the jury as follows: 'Now, gentlemen, if these defendants, or those acting under the lease because of any assignment, in July, permanently ceased to use this as a gas well, then there can be no recovery in this action.'

"The court erred in charging the jury as follows: 'But in case they had permanently ceased its use before the 20th of November, and were not at that time holding it with the intention of holding it as a gas well, then there could be no recovery in this action.'"

J. H. WHITE and S. W. CHILDS, for appellant.

WILLIS F. MCCOOK, for appellees.

PER CURIAM. The learned trial judge was clearly right in refusing to withdraw the case from the jury by giving the

binding instructions recited in the first specification of error. We find no error in either of the excerpts from the charge recited in the three remaining specifications respectively; nor do we think there is any question in either of them that calls for discussion.

The assignments of error are accordingly dismissed, and the judgment *Affirmed.*

ALVIN E. CROCKER v. WILLIAM F. MANLEY.

(164 Illinois 282; 45 N. E. 577. Supreme Court. November 23, 1896.)

Constituents of actionable fraud. To constitute fraud, false representations must relate to a material fact, and be made with a knowledge of their falsity and for the purpose of inducing the other party to act thereon, and such other party must actually act to his injury, in the reasonable belief that the representations are true.

Opinions and anticipations not representations of facts. Statements by a mine owner made to induce another to purchase stock therein, that the mine was rich in silver, would pay twenty to one hundred per cent dividends, and that there was enough ore on the dump at the mine to pay the par value of the stock, are matters of opinion only, and though false do not constitute fraud.

[1]**Buyer making examination for himself.** A deed to property made in payment for stock in a silver mine will not be set aside for alleged false representations as to the value of the mine, where the grantor, before making the deed, examines the mine for himself, expresses himself as entirely satisfied, and, in fact, acts on his own judgment.

Assays. Where a purchaser is allowed to freely select his own specimens and is misled by his own assays he has no case.

Assays of samples or specimens in general run higher than the assays of ore milled in quantities.

Appeal from Superior Court, Cook county; Theodore Brentano, Judge.

This was a bill in equity, brought by William F. Manley against Alvin E. Crocker, the appellant, the San Javier Mining & Milling Company, and T. C. Mills, to set aside conveyances from Manley to Crocker, and from the latter to Mills, of certain real estate in Oak Park, a suburb of Chicago, claimed to be worth $22,500, which conveyances it was alleged were procured by fraud and false representations. The superior court decreed in favor of the complainant, and from that decree Crocker appeals.

[1] *Tuck* v. *Downing*, 7 M. R. 84. *Whiting* v. *Hill*, 6 M. R. 693. Compare *Mudsill Co.* v. *Watrous*, 18 M. R. 1.

The record is somewhat voluminous, but the principal question presented is whether the evidence sustains the decree. In the year 1892, the appellant, who has for a number of years resided in Richmond, Ind., purchased a silver mine near La Ventura, in Mexico. After making the purchase, he organized a corporation under the laws of New Jersey, with a capital of $500,000. The appellee, Manley, who also resided at Richmond, learned of the mine through a man named Leonard, and entered into negotiations with Leonard, who acted as agent for the company or Crocker, to purchase stock in the company. Leonard, as the complainant testified, made various statements to him in regard to the mine and its rich qualities, and he agreed to take 1,000 shares of stock, provided Crocker's statements agreed with those of Leonard when he returned from Mexico. Crocker returned about March 6, 1893, and complainant had an interview with him at Leonard's store, where Crocker made a full statement in regard to the mine. Manley requested that the statement be reduced to writing, which was done within a few days, and upon receiving the statement in writing Manley took 1,000 shares of stock for $5,000, and gave two notes in payment,—one for $2,000, payable to Leonard; and the other for $3,000, payable to Crocker. On the 11th day of March, Manley took 1,000 shares more of stock at $5 per share, and executed his note for the same. On the 23d day of March he agreed with Leonard to take 1,000 shares more, but the stock was not issued until in July. In the last week in April, Manley went to Mexico for the purpose of making a personal examination. Upon arriving at the mine he made an examination of the property, went into the shafts, took specimens of the ore from the shafts and dumps, and, after making all the investigation and examination he desired, he returned to Chicago, and had the specimens assayed, and expressed himself well satisfied with the mine and its prospects. Some time

after Manley returned, he made an effort to sell his Chicago property, for the purpose of raising money to pay his notes given for stock, but, not being able to do so, he proposed to Crocker to return the stock and cancel the notes, but Crocker expressed a desire to have him remain in the company, and on June 10th submitted the following proposition:

"Richmond Ind., June 10, '93.

"Wm. F. Manley.

"Dear Sir: I will give you $75 a front foot for lots 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50,—300 feet fronting on Madison street, and 140 feet on Waller avenue, Austin, a suburb and part of Chicago, Illinois, making the total price $22,500, less the school-fund mortgage, and that portion of the mortgage held by the Home National Bank of Chicago, which may apply to and cover on lots 39 and 40, as shown by plat submitted to me this day; also less the taxes for this year, due in August or September next, and the assessments for improvements heretofore made upon the lots by the city, and the interest which has accrued up to the date of transfer. The payment shall be: I will surrender two notes which I hold against you for $2,500 each, and take up the notes which Valentine Leonard holds against you of $5,000, and pay the balance, whatever it may be, in stock at par in the San Javier Mining & Milling Company of La Ventura, Mexico, certificates for said stock to be issued to you as soon as the titles are all right, and transfers made by a good and sufficient deed of general warranty.

Yours truly,
Alvin E. Crocker."

June 13, following, Manley accepted the proposition in writing as follows:

"I hereby accept the above proposition, with the following stipulations: The said Crocker is to pay a certain note for $3,000, which has been discounted at the First National Bank, and given by me to him on March 3, 1893, due in six

months from date, and assume the payment of $1,000 of the mortgage which covers on lots 39 and 40, held by the parties named above.

"W. F. Manley."

On the 3d day of July, 1893, in pursuance of the contract, Manley conveyed the property to Crocker, who issued to him 1,000 shares of stock, as specified in the contract. At the same time the 1,000 shares of stock purchased through Leonard on March 23d were also issued, and delivered to Manley. A mill having been erected at the mine, the company, through Crocker, as manager, operated the mine during the summer and a part of the fall of 1893, but the results did not prove satisfactory, and the work at the mine was discontinued. In the meantime, one Ewing, who had been in charge of the mining under Crocker, was discharged, and on the 9th day of November he wrote Manley a letter, in which he informed him that he had been imposed upon; that the mine was worthless, etc. Finally, in the month of March, 1894, Manley tendered back the stock he held in the company, and demanded a reconveyance of the Chicago property. This being refused he filed this bill.

The fraudulent representations alleged in the bill are substantially as follows: That there was a certain valid corporation by name of the San Javier Mining & Milling Company, duly organized under the laws of the state of New Jersey, owning and operating a certain silver mine and mill and machinery for operating the same, situate near La Ventura, Mexico; that said defendant, Crocker, was treasurer of said corporation, and manager of the mill and mines owned and operated by the mining and milling company, in Mexico; that said Crocker was the owner of a large proportion of the stock of the company; that said Crocker, by himself and agents, and the defendant company, by its agents, falsely and fraudulently represented to your orator that said mines were rich with silver, and that they would pay a dividend of from

20 to 100 per cent. per annum upon the par value of the stock of said company; that there was enough silver ore on the dump at the mines to pay the par value of all of the stock that had been issued by the said mining and milling company, which was one-half million dollars; that the vein of ore in said mine was 16 feet in width, and assayed over $1,000 per ton; that the depth of the vein of ore was 200 feet, and the assays of the ore ran in richness from 30 ounces troy per ton to 1,500 ounces; that said vein ran from east to west, lacking 40 feet of one-half mile, and varied in width from 6 to 50 feet; that the manager of the mine for the company said unqualifiedly that he would pay 100 per cent. dividend, using the ore alone then developed and on the dump; that he also stated that, to reduce 50 tons per day, you could not use up the body of ore on hand in five years, without going any deeper in the shafts; that the said Crocker, the mining and milling company, and their agents and representatives, further represented that the mine was what was known as a "fissure vein," and that it grew richer the deeper you went into the mine; that there never had been such a development of rich ore in such a large body as was shown by the shafts in this mine; that they had recently sent a car load of ore taken from their said mine to a smelter in Monterey, Mexico, which assayed 68 ounces per ton of 2,000 pounds; that the average assays of the ore of said mine were over 200 ounces per ton; that they had a proposition from bankers in New York that they would list the stock on exchange, and capitalize the company at $10,000,000, and dispose of all the stock within 60 days, if said mine paid 20 per cent. on the stock the first year; that it was further represented that said defendants had at that time machinery in Mexico for the mill of 50 tons capacity per day; that they had shipped the boiler and the engine from Richmond, Ind., and the stamping machinery from Brooklyn, N. Y.; that all of said machinery was then in the City of Mexico, and would

be put up and operated within 90 days from that time, and from thenceforward the ccmpany would pay dividends upon the stock. It is also alleged in the bill that in the first instance, and before the issuance of said stock and acceptance of it by your orator, the said defendant, Crocker, made said statements to your orator orally, but at the time said he would, in addition to that, make a written statement covering the same statements that he made orally to your orator, and in pursuance of the said statement the said defendant, Crocker, made and signed a certain written statement, in which he detailed in part the representations that he had made to your orator orally in order to induce him to purchase and accept 1,000 shares of stock, and delivered said written statement to your orator, which is in the words and figures following, to wit:

"March 10, 1893.

"Wm. F. Manley, Esq., Richmond, Ind.

"Dear Sir: Inclosed I hand you cost of reduction of ore from the San Javier mines in Mexico, which I wish you to examine, and which I hope may meet with your approval, because it is very conservative, and can be verified at any time, and, with the assurance I have from our manager, can be and will be increased fivefold the first year. The ore body developing a vein of ore sixteen feet in width and assaying way up into the thousands per ton. The depth of this vein of ore is now about 200 feet, and the assays of the ore to run in richness from thirty oz. troy per ton to 1,500. This vein runs due east and west lacking forty feet of half a mile, and varies in width from six to fifty feet. Our manager says, unqualifiedly, that he will pay 100 per cent dividend, and using the ore alone now developed and on the dump. Using his own language: 'If you reduce fifty tons a day, you cannot use up the body of the ore now on hand, and you need not go one inch deeper in the shaft.' You are perfectly aware that all mines, especially fissure mines, grow richer the deeper you go, and the general expression in regard to the San Javier mines is that there has never been such a development of rich ore in such a large body as is shown in the

shafts of this mine. Besides the statement which I give of cost of reduction, showing such a large profit, I would say that the difference in the wages between Mexico and Colorado will make a difference in favor of Mexico, guarantying itself an immense dividend. Then all of our expenses to Mexicans is paid in Mexican money, while all of our receipts will be exchange, bearing at least fifty per cent premium. We lately sent a carload of ore, taken from the mine to the Monterey smelter, which assayed sixty-eight ounces per ton of 2,000 pounds. Our general assays of number of ounces per ton reaches now over 200 ounces per ton. There is not one feature in regard to this mining property but what it is indicative of very large dividends. We have no ice, snow, or sleet; can work 365 days in a year; and if we do our part, which our own interest compels us to do, there is no doubt but the returns for every dollar invested in this stock will bring larger returns than you have ever received before. Indeed, we have a proposition from bankers in New York, if we pay the dividends we know we can, that they will list the stock on the exchange, and capitalize the company at ten million dollars, and dispose of all the stock inside of sixty days.

"Yours, very truly,
"Alvin E. Crocker, Treasurer."

S. S. GREGORY, for appellant.

WALTER OLDS, C. F. GRIFFIN and W. S. OPPENHEIM, for appellee.

CRAIG, J. (after stating the facts). In regard to the allegations in the bill as to the organization of the company, its ownership of the mines, stock owned by Crocker, and that he was treasurer and manager, there is no controversy, it not being claimed that there was any falsity as to these averments. In reference to a large portion of the other averments of fact set up and relied upon in the bill, it will be found upon due examination that in the main they are not representations of fact, but, on the other hand, they are mere matters

of opinion. Under the latter head may be mentioned the following: That the mines were rich with silver, and that they would pay a dividend of from 20 to 100 per cent.; that there was enough silver ore on the dump at the mines to pay the par value of the stock; and other like statements. These allegations of mere matter of opinion, as will be seen from the authorities hereinafter referred to, whether false or true, do not form a basis upon which an action can be founded. There are, however, some four or five allegations of fact, as contradistinguished from allegations of opinion, which we will consider.

In regard to the allegations that the vein runs from east to west lacking 40 feet of a half mile, that it varies in width from 6 to 50 feet, and that the depth of the vein is 200 feet, from an examination of the testimony of the defendant and the complainant and the superintendent Ewing, and the report of Bridge, it will be found such allegations were substantially correct.

The next allegation of fact is that the mine was what was known as a "fissure vein." Crocker testified that the vein was a fissure vein, as that term was understood. He testified: "A fissure vein, according to Hughes' Dictionary, is a longitudinal opening with a foreign substance in it. The vein is a fissure vein in the San Javier and Guadalupe mines." In this he seems to be corroborated by Bridge, and contradicted only by Ewing, and Ewing's testimony is contradicted by his statement to Manley at the time he visited the mine. Under the evidence, it cannot be said that this statement was false.

The next allegation of fact is that a car load of ore taken from the mine had been sent to the Monterey smelter, which assayed 68 ounces per ton. The defendant Crocker testified that before the statement was made, and before he incorporated it in his written statement to Manley, Jaurequeberry, the manager, informed him of the fact, and that Ewing, who was also in charge of the mines, corroborated the state-

ment. The statement was, therefore, made by the defendant in good faith, believing it to be true. Whether the statement was true or false is left in doubt from the evidence. A carload of ore was shipped to Monterey, but whether it was shipped from the mine in question or some other mine is left in doubt from the evidence. Ewing testified that he shipped the ore from the Incarnacion mines, while the witness Shope testified that he shipped a half carload, but not from the mine in question. It may be true that this statement was false, but there is so much uncertainty and doubt in regard to what the fact really was that it would not be safe to convict a person of fraud on such uncertain testimony.

The next allegation of fact was that "our general assays of number of ounces per ton reaches now over 200 ounces per ton." This statement was made before the defendant had worked the mine, and, of course, had reference to assays of samples of ore; and it appears from the testimony that assays of sample or specimen ores run higher than the ore when milled in large quantities, and we find no evidence in the record that the statement was not true.

There is also an allegation that there was a statement that the mill at the mines was to be capable of crushing 50 tons per day. The writing containing the defendant's statements contains no such averment, and Crocker testified that in all the conversations the talk was that the mill was to be a 10-stamp mill. In this he is corroborated by C. N. Harold, who testified that Crocker said he would have the mill running in 90 days, and the capacity was to be 30 tons a day, and he intended to add more soon.

Under the facts established by the evidence, was the complainant entitled to a decree?

In *Southern Development Co.* v. *Silva,* 125 U. S. 247, 8 Sup. Ct. 881, the supreme court of the United States lay down the rule in regard to a recovery in a case of this character as follows: "First, that the defendant has made a representation

in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not believed by the defendant, on reasonable grounds to be true; fourthly, that it was made with the intent that it should be acted upon; fifthly, that it was acted upon by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of the falsity, and reasonably believed it to be true."

In regard to kind or character of representations which are actionable, 1 Bigelow, Frauds, pp. 473, 474, lays down the rule that the representations must consist of matters of fact, and not of opinion.

In *Hemmer* v. *Cooper*, 8 Allen, 334, in speaking in regard to representations of a vendor in regard to the price he paid for real estate the court said: "The representations of a vendor of real estate to the vendee, as to the price which he paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that, even when they are false, and uttered with a view to deceive, they furnish no ground of action. *Medbury* v. *Watson*, 6 Metc. (Mass.)246, and cases there cited." In *Holbrook* v. *Connor*, 60 Me. 578, the same doctrine is announced.

In *Hauk* v. *Brownell*, 120 Ill. 163, 11 N. E. 416, the cases from Massachusetts and Maine are cited with approval, and it is said: "Where the vendor and vendee are dealing at arm's length with each other, the representations of the former as to the cost of his property, even though false, and made with a view to deceive, will furnish no ground of action. They are looked upon merely as representations in regard to value, urged for the purpose of enhancing the price, and any purchaser who relies upon them is considered as too careless of his own interest to be entitled to relief."

In *Noetling* v. *Wright*, 72 Ill. 390, in speaking in regard to representations made by a vendor of property as to value, the price he has been offered, or the good qualities of the

property, it is said: "Statements of this character do not in any wise relieve the purchaser from the responsibility of investigation into the true condition or the value of the property about to be purchased. Such statements are only regarded as gratis dicta, and as is well said by Kerr in his work on Fraud and Mistake (page 84): 'A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his imprudence.'"

Tuck v. *Downing*, 76 Ill. 71, was a bill to rescind a contract for fraud, where mining stock has been sold as is the case here; and in discussing what may be regarded as mere opinion or a statement of fact it is, among other things, said: "The extravagant declarations of appellant after his return to Erie with the committee of examination, and made in their presence, that a silver mine with copper croppings was an inexhaustible mine of wealth; that the Aqua Frio and Black Metallic were the biggest things in Utah; that situated at the Fork Hills was greatly to their advantage; that they were well-developed mines with well-defined veins; that he had never seen, in all his experience, such a 'blow out;' that a furnace ought to be erected at once, as the ore could be mined, and all the money put into it could be got out in a few months,—was mere gassing, and for the purpose of extolling what these men, through their committee, had seen, and could judge of the prospects and promise for themselves. There was nothing unlawful or prohibited in law in all this. It was after this examination and report by Camp and Barr the share was bought by complainant, and the note in question executed, and a deed delivered and accepted for the property. It is impossible their statement should be regarded as anything more than opinions, for no man can tell how a discovery like this may result. Appellee could have understood them in no other sense, and the same may be said of

the report of the committee. They were opinions founded on facts as they appeared to them." In *Southern Development Co.* v. *Silva, supra, Tuck* v. *Downing* was cited, and a large portion of the opinion quoted with approval. In *Farnsworth* v. *Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, the same doctrine is announced.

There are other authorities holding to the same doctrine, but it will not be necessary to cite them here. It is manifest under the law as established in the text-books and in the decisions of the different courts, the complainant has failed to make out a case wherein he was entitled to recover.

There is another fact connected with the case that has an important bearing. It appears that in the latter part of April, 1893,—long before the conveyance was made which complainant seeks to set aside,—he determined to visit the mine for the purpose of determining for himself whether the mine was in fact what it was represented to be. He went there and was met by Ewing, the superintendent, O. P. Crocker, a son of the defendant, McGuire, and a Mexican. He made a thorough examination of the mine and its prospects. He walked over the grounds, went into the shafts, made selections of specimens for assay, placed each specimen in a small sack prepared for that purpose, marked each one, and then placed the small sacks in a large one, and brought the specimens home with him, and had them assayed. Upon his return he gave glowing accounts of the mine, and the richness of its ore. The witness Harold detailed a conversation he had with Manley after his return, substantially as follows: "I think I asked him something about the quantity of ore he found, and as we looked at each sample I would ask him how much. He would make the remark that there were thousands of tons, and of others not quite so much, but he said there was plenty of ore; and again I think he made the statement to me that there was all the ore there that you could wish for." On cross-examination the witness said, re-

ferring to Manley: "He said there was a great quantity of ore on the dump, and that a number of assays were made from the dump, which showed it to be very valuable; and, judging from the quantity on the dump, he thought there was $100,000 on the dump. He also based his opinion on what he saw in the mine; not only what he saw in the mine, but the length of the mine where they could trace the ore." Other witnesses corroborate these statements.

When the complainant was at the mine he was afforded every facility to examine and investigate that he desired, and the specimens which he brought away were of his own selection. On the hearing the court found that no fraud or deception was practiced on the complainant in the selection of the specimens, nor were they tampered with by the defendant, and the finding seems to be sustained by the evidence.

In regard to the assays of the specimens, and the faith of the complainant in the mine if the specimens fairly represented the ore therein, he testified.

"Q. Was the result of these assays satisfactory to you? A. They were. Q. They were such, were they not, that if you believed that that ore—that these specimens fairly represented the ore in that mine—you would still regard that as a good mine, would you not? A. I felt quite well satisfied. Q. That would be your feeling now, would it not? A. Yes, sir. Q. If you felt that it was honest? A. The assays I had made, made an average of 228 ounces per ton. Q. Did that include these high-grade assays? A. All of them. Q. The 371 and 2,300 ounces? A. Yes, sir. And I consulted with some miners here, who told me that, if the mine did have that—well, we had a perfect bonanza, and I was very much pleased with the result of the assays. Q. And you would still feel, notwithstanding everything else that has been said and done, if you were convinced that the specimens you obtained represented an honest average of the

mine, you would still feel that it was a good mine, would you not? A. I would. I think it would pay well."

The evidence in this record fails to show that the complainant was imposed upon in the selection of the specimens, or that any fraud was practiced on him after they were selected. If, therefore, the specimens failed to represent an honest average of the mine, the complainant, and he alone, was to blame.

In *Farnsworth* v. *Duffner, supra,* which was a bill for the rescission of a contract of purchase, and to recover the money paid on the contract, on the ground that it was entered into through false and fraudulent representations, in the decision of the case it was said: "Where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities he will not be heard to say that he has been deceived by the vendor's misrepresentations." It is there, among other things, said: "In *Ludington* v. *Renick,* 7 W. Va. 273, it was held that 'a party seeking the rescission of a contract on the ground of misrepresentation must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.' In the case of *Attwood* v. *Small,* decided by the house of lords, and reported in 6 Clark & F. 232, 233, it was held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations.' And in 2 Pom. Eq. Jur. § 892, it is declared that a party is not justified in relying upon representations made to him: '(1) When, before entering into the contract or other transaction, he actually resorts to the

proper means of ascertaining the truth and verifying the statement; (2) when, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.' But, if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such examination, and relied upon the evidence obtained by such examination, and not upon the representations."

What was said in the case cited applies here. The complainant, apparently not being satisfied with the representations of Crocker in regard to the mine, proceeded to see and investigate for himself; and after making a thorough examination he had, so far as appears, as much information in regard to the mine and its richness as the defendant, Crocker, and he doubtless relied upon the information obtained, rather than upon representations which had been made before.

In view of all the facts, we do not think the evidence makes out a case which would authorize a court of equity to rescind the contract.

The judgment of the superior court will be reversed, and the cause will be remanded, with directions to dismiss the bill

Reversed and remanded.

MARCUS A. BETTMAN ET AL. v. THOMAS B. HARNESS ET AL.

(42 West Virginia 433; 26 S. E. 271. Supreme Court of Appeals. November 25, 1896.)

[1]**Full relief in equity.** Equity has jurisdiction, by injunction, to prevent acts of irreparable injury to land, even though there is controversy as to title between the parties, and having jurisdiction on that ground, will go on to give full relief, though in so doing it be necessary to decide between two adverse titles.

[2]**Oil pumping irreparable injury.** The unlawful extraction of petroleum oil or gas from land, they being part of the land, is an act of irreparable injury. Equity will enjoin it.

[3]**A preliminary injunction must not do what can only be done after full hearing** by final decree, as by changing the possession of realty, or depriving one in possession of its benefits, in any other respect than as to the wrongful act proper to be enjoined; the proper purpose of such injunction being to preserve the present status until a full hearing on the merits shall be had. An injunction as to so much of it as is excessive is void, and ought to be modified on motion.

---

[1]Plaintiffs being in possession they need not bring ejectment in aid. *Allen* v. *Dunlap*, 24 Oreg. 229; 33 Pac. 675.

What amounts to disputed title between legal and equitable claimants. *St. Louis Co.* v. *Montana Co.* 17 M. R. 658.

Equity may enjoin trespass and pass on rights of title at same time. *Oolagah Co.* v. *McCaleb*, 68 Fed. 86.

Relation of the ejectment to the injunction suit. *Heyward* v. *Farmers Co.* 42 S. C. 138; 19 S. E. 963; 20 S. E. 64.

[2]*Williamson* v. *Jones*, 43 W. Va. 562; 19 M. R.—

Threatening to sink a natural gas well is injury which cannot be adequately measured at law and on that ground a proper case for injunction. *Westmoreland Co.* v. *DeWitt*, 130 Pa. 235; 18 Atl. 724. *Indianapolis Co.* v. *Kibbey*, 17 M. R. 677.

[3]A defendant in possession cannot be enjoined from "entering or trespassing upon" ground of which he is already in possession. *Williams* v. *Long*, 129 Cal. 229; 61 Pac. 1087.

It must be an extreme case to deprive a party of his possession by receiver or injunction on a preliminary hearing. *Cosmos Co.* v. *Gray Eagle Co.* 104 Fed. 20.

Injunction will not take the place of ejectment where defendant is in possession. *Cosmos Co.* v. *Gray Eagle Co.* 112 Fed. 4.

Construction of lease. A lease for oil and gas contains the clause, "To have and to hold the said premises unto said party of the second part during and until the full term of two years, and as much longer as oil or gas is found in paying quantities thereon, or the rental paid thereon," and provides for a rent of one-eighth of the oil, and $250 per year for gas, and has a clause reading: "Operations shall be commenced and one well completed within one month, and, in case of failure to complete one well within such time, the party of the second part agrees to pay to the parties of the first part, for such delay, fifteen dollars per month in advance after said time for completing such well as above specified, and the parties of the first part agree to accept such sum as a full consideration and payment for such delay until one well shall be completed; and a failure to complete one well or to make such payments for such delay is to render this lease null and void at the option of the lessor." The lessee having failed to begin operations within the two years, has no right to continue the lease by payment of $15 per month, but the lease is ended.

The words "or" and "and" in a contract will be changed and read as "and" and "or" where it is plain they were so intended.

Estoppel in pais. To bind one by estoppel in pais from statement or conduct, he must have stated, or led another to believe in, something as a fact, and that other must be ignorant of the contrary, and must rely on it, and act to his injury differently from what he would have done but for such statement or conduct.

(Syllabus by the Court.)

Appeal from Circuit Court, Pleasants county.

Bill by Bettman & Watson against Thomas B. Harness and others. Decree for plaintiffs, and defendants appeal. Bill dismissed.

W. P. HUBBARD, H. P. CAMDEN and WEIL & THORP, for appellants.

VAN WINKLE & AMBLER and J. G. MCCLURE, for appellees.

BRANNON, J. Harness and wife made two leases giving Watson exclusive privilege to drill and operate for petroleum

oil and gas on two tracts of land in Pleasants county, which he assigned to Marcus A. and David Bettman, retaining, however, some interest, the three claiming as partners, under the name of Bettman & Watson. No possession was taken under these leases, and later Harness and wife, claiming that these leases had expired, made a lease for oil purposes of both tracts to Finnegan, under which possession was taken, and boring of a well for oil was begun, when Bettman & Watson obtained against Finnegan and others an injunction enjoining operations under this second lease; and, the judge having overruled a motion to dissolve this injunction, the defendants to the injunction appealed. Further facts are stated below in connection with the law points to which they relate.

Will equity entertain this suit? Counsel for appellants ably insist that the acts enjoined are but trespass to realty, reparable in damages in a court of law; that no injunction lies; and that, under cover of injunction, it is an effort to try title to land in equity, when the law court is open for adequate remedy by ejectment, both to recover possession and damages. Clearly, the general rule is that equity will not restrain a mere trespass to land, and, under the guise of so doing, try title to land, by entertaining what may be called an "ejectment bill;" but that rule has been found in later years not to answer fully the needs of men in their changing multifarious wants in the calls of life, and we find exceptions fastened upon the rule, fixed as the rule itself. The last case decided by the great Chancellor Kent, driven from the bench in the meridian of his greatness by the constitution of New York because he had attained the age of 60 years, tells us of this change of the old rigor of the rule. *Jerome* v. *Ross*, 7 Johns. Ch. 315. The rule there stated is that "an injunction is not granted to restrain a mere trespass, where an injury is not irreparable, and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in

the ordinary course of law. It must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the mischief is remediless, to entitle a party to an injunction." Judge Story, after a review of the cases, says in 2 Eq. Jur. § 928: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, they were extremely reluctant to interfere at all, even in regard to repeated trespasses; but now there is not the slightest hesitation, if the acts done, or threatened to be done, to the property, would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would be a great failure of justice in the country." In trespass to mines there is greater liberality in allowing injunctions than in ordinary trespass to land, since the injury goes to the destruction of the minerals,—the chief value. 1 High, Inj. § 730.

These principles have been followed in America in cases too numerous to cite here. For some of them, see note to *Jerome* v. *Ross,* 11 Am. Dec. 498, 500; *Indian River Steamboat Co.* v. *East Coast Transp. Co.* (Fla.) 29 Am. St. Rep. 258, 277, 10 South. 480; *Carney* v. *Hadley* (Fla.) 37 Am. St. Rep. 108, 14 South. 4; note to *Smith* v. *Gardner* (Or.) 53 Am. Rep. 346, 6 Pac. 771. 2 High, Inj. § 697, emphasizes this exception of irremediable injury. Decisions binding us as authority do not oppose, but recognize, this exception. *Anderson* v. *Harvey's Heirs,* 10 Grat. 386, 398, pointedly recognizes it. There an injunction was sustained against one who, under color of adverse title, was taking out iron ore. In the cases of this state cited by counsel against jurisdiction in equity for this case (*McMillan* v. *Ferrell,* 7 W. Va. 223; *Cox* v. *Douglass,* 20 W. Va. 175; *Schoonover* v. *Bright,* 24 W. Va. 698; *Cresap* v. *Kemble,* 26 W. Va. 603;

Watson v. *Ferrell,* 34 W. Va. 406, 12 S. E. 724), this exception of irreparable damage is definitely admitted. They were cases of mere naked trespasses, and the omission of this averment was mentioned as a want of the bills. *Christian* v. *Vance,* 41 W. Va. 754, 24 S. E. 506, and *Moore* v. *McNutt,* 41 W. Va. 695, 24 S. E. 682, do not bear on this matter, but on the principles of jurisdiction in equity to remove cloud on land title. The jurisdiction for this case is not claimed to rest on the right to remove cloud on title, but on irreparable injury, and that, jurisdiction being warranted on that ground, the court will go on to adjudicate on the rights of parties, as it has jurisdiction for one purpose.

It makes no difference, if the elements of irreparable injury be present, whether the party doing it be solvent or insolvent. 1 Beach, Inj. § 35. Such being the rule, the question—often of difficulty—is one of its practical application. What is irreparable injury? It is impossible to define it inflexibly. Rights of property and its uses change so; so many new rights of property with new uses arise as time goes on. Here is the right to oil and gas a few years ago unknown; the right sometimes in separate ownership. The word "irreparable" means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured. The courts have generally regarded as irreparable injuries the digging into mines of coal, iron, lead, and precious metals, and, as such injuries subtract from the very substance of the estate, and tend to its ultimate destruction, equity is said to be prompt to restrain them. Rock, if of special value, comes under this rule. See *U. S.* v. *Gear,* 3 How. 120, and other cases cited in note to *Jerome* v. *Ross,* 11 Am. Dec. 501; note to *Smith* v. *Gardner* (Or.) 53 Am. Rep. 347, 6 Pac. 771; 1 Beach, Inj. § 35; 1 High, Inj. § 730. We know but little of petroleum oil and gas hidden far in the bowels of the earth, but from that little we can

say they are of great value, and are exhaustible, and, when exhausted in a locality, cannot be restored by the art of man, and perhaps never even by the mysterious alchemy of nature. Surely, they fall under the rule which considers the substraction of precious things from under the soil as working irreparable injury, as much as iron ore in *Anderson* v. *Harvey's Heirs,* 10 Grat. 386, to which I refer as decisive and binding under this branch of this case. We know that these substances are the sole property and value of the plaintiffs' estate under their lease,—the only object of the lease. In *Williamson* v. *Jones,* 39 W. Va. 231, 19 S. E. 436, we decided that petroleum oil in place is a part of the realty, and its unlawful removal a disherison which equity will enjoin.

The law affords no adequate remedy so as to deprive the party of injunction. An injury to realty may be incapable of compensation in money for several reasons: (1) It may be destructive of the very substance of the estate; (2) it may not be capable of estimation in terms of money; (3) it may be so continuous and permanent that there is no instant of time when it can be said to be complete, so that its extent may be computed; (4) it may be vexatiously persisted in, in spite of repeated verdicts. In this case, when must the party sue? When all the oil is drained out, and the other party is insolvent? Or must he have suit after suit through years? At what time can we estimate the entire damage? How, with justice to either party? To deprive a party of his injunction to keep his own oil in his own soil, it is not enough to say that he has some remedy at law, but it must be adequate and commensurate with his whole right in the particular case. *Jerome* v. *Ross,* 11 Am. Dec. 501; *Osborn* v. *Bank,* 9 Wheat. 738; 1 High, Inj. § 30. To avoid multiplicity of suits, injunction may lie, because that shows inadequacy of legal remedy. *Walling* v. *Miller,* 108 N. Y. 173, 15 N. E. 65; 1 High, Inj. § 702; *Lewis* v. *Town of North Kingstown* (R. I.) 27 Am. St. Rep. 727, 11 Atl. 173. Where repeated

acts are done, the entire wrong may be prevented by injunction, though each act itself may not be destructive to the inheritance, and not irreparable, and the legal remedy adequate, if that act stood single and alone. 1 Beach, Inj. § 35. What title is there to maintain such an injunction? Will it lie when it is disputed, to thus try the title in equity? The syllabus in *Cresap* v. *Kemble,* 26 W. Va. 603, says it must be established by legal adjudication, or undisputed. So it is often stated in the books. Does it mean already tried at law? I suppose not. The opinion in the case does not say so, but says it is sufficient if the bill clearly aver good title. Such I think is the law. Here there is a wilderness of decisions, variant and indefinite, arising from the difficulty encountered by the courts in the effort to at once recognize the rule that equity will not try land title and deprive a party in possession of its benefits, and, on the other hand, the rule that irreparable injury will be stayed by injunction. Take the case where irreparable injury is being done to land claimed under two hostile titles. One party files a bill of injunction showing on its face clear title, and the other answers, showing clear title prima facie. Will you at once dissolve the injunction, and send the party to try his title at law, from the fact that there are adverse claims, when in fact the plaintiff ultimately shows, or could show, the better title? Much law can be found to answer "Yes." I think the true answer to that question is "No." Where there is irreparable damage, injunction lies, though there be conflicting title. *Erhardt* v. *Boaro,* 113 U. S. 537, 5 Sup. Ct. 565; *Iron Co.* v. *Reymert,* 45 N. Y. 703; note to *Jerome* v. *Ross,* 11 Am. Dec. 506; 1 High, Inj. § 69; 2 Beach, Inj. § 1140. *Anderson* v. *Harvey's Heirs,* 10 Grat. 386, was a case of adverse title. Equity jurisdiction, from its flexibility and facility in practice in administering justice, had been for centuries ever expanding its scope. So here. Since writing to this point I notice section 367 of the late work of Spelling, on

Extraordinary Relief, which, from my examination of the subject, fairly states the law of our days on this knotty subject: "Formerly great importance was attached to the fact that a defendant whom it was sought to restrain from committing trespass in good faith set up a claim to the land; and a few courts still attach undue importance to a dispute concerning the title, apparently losing sight of the departure from the early practice in this respect. It is true now, as it ever has been, that an injunction will not be granted where the title of the plaintiff is in dispute previous to the determination of the legal rights of the parties, unless the threatened act is of such a nature that, should the right to commit it be decided against him, the consequence would be irreparable. The prevailing view and practice of the present day may be thus stated: (1) Where the bill states facts which show that a threatened trespass, if not prevented, will result in irreparable damage, or is in character and tendency destructive to the inheritance or to that which gives its chief value, an injunction will be granted, notwithstanding a dispute, or even pending litigation, as to title. (2) Where an action has been already commenced to try title, the injunction will only be temporary, to be dissolved or made perpetual, according to the results of the action. (3) Where no action has been begun, injunction will be granted and continued to give the defendant an opportunity to bring an action, which being prosecuted to judgment against the complainant in possession will entitle him to a dissolution of the injunction; but, if the action at law has an opposite result, the injunction will be perpetuated. (4) The rule applies, and the same course is taken, when the ground upon which the relief is sought and granted is the prevention of a multiplicity of suits. Hence the only influence which a dispute as to title can have, in case of irreparable injury sufficiently alleged, is in the character of relief granted,—whether absolute or conditional and temporary; and that is of no decisive

importance on the question of whether any relief whatever shall be granted." And equity, having once taken jurisdiction, will go on to do complete justice, though in so doing it have to try title, and administer remedies which properly pertain to courts of law. Note in *Lewis* v. *Town of North Kingstown* (R. I.) 27 Am. St. Rep. 727, 11 Atl. 173; *Yates* v. *Stuart's Adm'r,* 39 W. Va. 124, 19 S. E. 423. Such a bill must not only allege irreparable injury, but state facts making a case of irreparable injury. *Watson* v. *Ferrell,* 34 W. Va. 406, 12 S. E. 724. The bill alleges that the defendants are about to bore for and take oil from the premises,—facts which per se constitute irreparable injury.

Another subject. Appellants contend that the injunction awarded is erroneous,—in fact void,—because too broad. The sole object of an interlocutory or preliminary injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. It cannot be used for the purpose of taking property out of the possession of one party, and giving its possession to another; nor does it compel the defendant to undo what he has done, as this might injure him as much as his act would injure his opponent. Injunction prevents the further continuance of injurious acts begun, or prevents doing them, if only threatened. It acts only prospectively to preserve things in statu quo until ultimate decision. It does not prejudge without hearing; it does not anticipate ultimate decision, giving decision on the merits, and then hearing. High, Inj. §§ 4, 5, 355, 715. On an application to grant or to dissolve a preliminary injunction, the court will not decide questions of title, but will defer this till a hearing on the merits; nor will it change possession. "Where the defendant is engaged in removing from the complainant's estate that which constitutes its chief value,—for instance,

lumber,—the case is one peculiarly within the province of a court of equity to stop the mischief through its preventive writ. And if a preliminary order restrains one of the parties from interference with the property in dispute, and leaves the other free so to interfere, the court will modify the order so as to do equal justice to the parties, and keep the property in statu quo until the determination of the controversy as to title and their respective rights." "If it undertakes, or if its effect is, to dispose of the merits of the controversy without a hearing, or if it divests a party of his possession or rights without a trial, it is void." 1 Beach, Inj. §§ 110, 112. Possession is prima facie evidence of rightful title, because it is one of the elements of title, is sacred, and no court can in any form of proceeding take it from a man without a hearing, without overthrowing the maxim that no man shall be condemned in person or deprived of property without a day in court and due process. Try the present case under these rules. The order of injunction, a purely preliminary one, did virtually what a final one on final decree would have done, save that a final decree would have delivered possession expressly, while this does so virtually; for it not only enjoins the defendants from boring for oil, but from "in any manner interfering with the rights of the plaintiffs under the leases" under which they claimed, "and from interfering with the plaintiff's use of said land under said leases, and from setting up any claim against the rights of the plaintiffs under said leases," and enjoined the defendants "from setting up any claim under the pretended leases" under which the defendants claimed. Under this wide injunction, how could defendants even continue in possession when it told them not even to claim under their lease? If the plaintiffs entered on the premises to bore just where the defendants were boring, how could the defendants lift a finger in resistance, or fail to yield the very spot where they were boring, if the plaintiffs put their derrick there? Later, the defendants

asked the court to modify the injunction, but it refused to do so. If, on full hearing, this order had been found to be properly anticipatory of the eventual real rights, it would be then a dead issue, and I thought that the later hearing to dissolve might be such a hearing; but though it was on bill, answers, and other papers, and is practically, no doubt, as full a hearing as would ever take place, yet it was on ex parte affidavits, not on depositions where cross-examination was allowed, and hence it is not such a hearing. The preliminary injunction was erroneous, and the refusal to modify was error to the prejudice of appellants, and, if we did not decide the question on the merits for the plaintiffs, we would modify the injunction. *Boyd* v. *Woolwine*, 40 W. Va. 282, 21 S. E. 1020, allowing a mandatory injunction, is cited to justify this. That was to preserve the status quo by requiring defendant to unlock gates on a private way. The court did not decide that this was or was not right ab initio, but, finding it right in the end, upheld it. It is argued that this injunction may be justified by the fact that the defendants were boring on adjacent lands, and thus draining oil from this land. Is it meant that this injunction could stop boring on adjacent land, or stop draining through a well on adjacent land of oil from this land? How do we know there is oil on this land? Shall we stop boring on the adjacent land without this knowledge? We could not stop it with certain knowledge of the fact, because oil is fugitive, and when it passes from one man's land, and comes to the surface through a well on another's land, it belongs to him on whose land it reaches the surface, even if we know it came from the other land.

Another subject. I come now to the merits,—the rights of the plaintiffs under their leases. No work for development of oil or gas was done under them within the two years fixed by them as the term, but through that term, and

for 13 months after its close, the lessees paid the sums of $15 and $5 per month required by them for delay of work of development, and the lessors received that money up to the close of that 13 months, when they refused to receive any more, and the lessees deposited it thereafter in bank. Did such payments continue the leases under their letter after the two years? That depends on their construction. The lessees say they had the right to bore or not, as they chose; that, if they did not bore, all they had to do was to pay said monthly sums, and their two leases were kept in full force, not merely within the two years, but thereafter until they should cease to pay. Take the habendum clause, reading, "To have and to hold the said premises for said purposes only * * * during and until the full term of two years next ensuing the date above written, and as much longer as oil or gas is found in paying quantities thereon, or the rental paid thereon." What do the words "or the rental paid thereon" mean? For they are words which, it is thought, prolong the term over two years, the claim being that either the production of oil or payment of the fixed sums, either one or the other, extended the term. Here bring in another part of these leases: "Operations on the above-described premises shall be commenced and one well shall be completed within one month, unavoidable accidents and delays excepted; and, in case of failure to complete one well within such time, the party of the second part agrees to pay to the parties of the first part, for such delay, the sum of fifteen dollars per month in advance after the said time for completing such well as above specified, and the parties of the first part hereby agree to accept such sum as a full consideration and payment for such delay until one well shall be completed; and a failure to complete one well, or to make such payments for said delay, is to render this lease null and void at the option of the lessor. A deposit to the

credit of the parties of the first part in Parkersburg National Bank, Parkersburg, W. Va., is to be a good payment of any moneys due under this contract."

Again I ask, what do the words "or the rental paid thereon" mean? Does the word "rental" mean the fixed sum of $15? If not, there is no extension from its payment. Now, the clause providing for payment of the $15 does not call it rental, as might be expected if so considered, but says it is for delay in completing a well. It says a well shall be completed in a month, and, on failure to do so within a month, the lessee is to pay $15 per month after that month, and the lessor to accept it as full pay for such delay until a well should be completed; that is, provided it be within two years, since on this clause alone we would say it contemplates completion within the term of the lease. "For such delay." What delay? The delay just then spoken of. So that we cannot say that the word "rental" in the first clause gets its meaning from the second clause. And the monthly payment is not, in nature, rent or rental, unless plainly given that meaning. We can use words in other than their first or usual sense, but it must clearly appear that such is the purpose. This money has been sometimes called "commutation money." Call it what you may, but you cannot make rent out of it in the first instance. But taking the two clauses together, does it, where used in the first clause, point to this money payable in lieu of boring? It must be given some meaning, and what else can it mean? what else is in the lease for it to mean? you may ask. I see nothing else to refer to it except the one-eighth share of oil and the $250 per year for gas as rent provided by the lease, should they be found in paying quantity. But you will say this cannot be, because the lease says the term shall be two years, and "as much longer as oil or gas is found in paying quantities or the rental paid thereon," and this clause presupposes insufficient oil and gas; and how can a fraction of the oil be

then paid, or the rent for the gas either? And it certainly provides something to extend the term on failure of oil and gas. It provides an extension of the term in either one or the other of two ways,—either by finding oil in paying quantities, or, if that do not happen, then by payment of rental; for it uses the word "or," notice; and hence, you will say, there is nothing else in the contract to refer the word "rental" to but these monthly payments. I think that the real intention was to say that the lease should continue two years, and as much longer as gas or oil in paying quantity be found, and the rent for that gas and oil be paid. We want to get at what was the most likely meaning of the words used. Courts may look to language, the subject-matter, and surrounding circumstances to get at the meaning, and thus place themselves in the situation the parties were in, to glean their probable purpose. Point 19, *Crislip* v. *Cain,* 19 W. Va. 438; *Caperton's Adm'rs* v. *Caperton's Heirs,* 36 W. Va. 479, 15 S. E. 257; *Nash* v. *Towne,* 5 Wall. 689. Here are a landowner and an oil producer negotiating a lease. A term of only two years is fixed; but plainly that is only the period for completing a well. If a good one is obtained, the operator wants longer time, and he inserts a clause extending the term as long as oil or gas is produced in paying quantities; but the lessor wants the lease continued only upon condition that his share of oil and gas rent be paid, and he means to have a clause which provides a continuance of the lease as long as both oil is produced and his rent paid. It is unreasonable to suppose he would continue the lease, and omit a guaranty of his rent; that he would agree to continue without a guaranty of prompt payment. Here is a clause annexed to the clause continuing the lease which will insure the rent, if we give the word "or" the meaning of "and." Words must serve intention in the construction of contracts. Story, Cont. §§ 773, 774. These words "or" and "and" are so often used inexactly that the one will be read as if the other had been

used, to serve the plain intent. It is done in the construction of wills (Schouler, Wills, § 477), and in the construction of statutes (Suth. St. Const. § 252); and if the word of a wise legislative assembly must yield to intention, why not the word of two men not so learned and exact? The intention is the question in all these cases. Bish. Cont. § 383, says it can be done in the construction of contracts. Likewise, 2 Pars. Cont. 497. Just now I notice the case of *Petty* v. *Fogle,* 16 W. Va. 497, holding this to be law in this state in construing contracts. And note that clause providing that a failure to complete a well or make payment for delay shall forfeit the lease. Does not this mean that failure to make payments within that two years shall forfeit? It does not mean that failure to make payments after that shall forfeit the lease, as they would not likely provide a forfeiture for nonpayment after expiration of that term, as none was needed. This goes to show that these payments are not rentals, but compensation only for delay within the two years.

This much I have said upon the letter of the lease; but as we are placing ourselves in the situation of the parties, and viewing the subject-matter on which they were treating, and seeking their probable aim, how hard upon the landholder it would be, how improbable, to say that when he has, by express words, shown a fixed purpose to set two years as the limit within which a well must be completed, he would turn right around, and give his caution all away, by agreeing to an indefinite postponement of development on what would be a mere pittance compared with what he would realize if producing wells were bored,—the very object for which he makes a lease; certainly the controlling object. And all the while that same lessee, with wells on an adjoining lease, is draining all the oil away from this landholder and paying the pittance. This would work for the owner a very unfortunate result, which was furthest from his intention. He

relied on development, because the lessee bound himself to develop by the lease. That was the motive on his part. If he had been warned of this result, he would never have leased. This construction is not harsh on the oil producer. He has had the term he fixed. The other construction would cover the whole country with cloud and incumbrance over titles for many years, preventing the use and transfer of property, the development of the country, and promoting and furthering monopoly; for we know, and may lawfully know, as all men know, that vast areas are held by companies or organizations holding these leases for future use. I shall not say that this construction is one about which men may not fairly differ. But suppose we were in doubt; should we not give that construction which would avoid the evils above referred to? This court said in *Miller* v. *Insurance Co.*, 12 W. Va. 116, that in construing an instrument prepared by an insurer it ought to be read most strongly against the maker, especially where the terms or language are doubtful or ambiguous, because prepared by the agent of the company or by the company. In *Insurance Co.* v. *Wilkinson,* 13 Wall. 222, Justice Miller said on an insurance policy that it could not be denied, logically considered, that the application is the work of the assured, and if left to himself, or to such assistance as he might select, such person would be his agent, and he alone responsible; but it was so well known that no court would be justified in shutting its eyes to it, that insurance companies send agents all over the land soliciting applications, and parties taking policies look to such agents, and rely on them. And in *Moulor* v. *Insurance Co.,* 111 U. S. 335, 4 Sup. Ct. 466, Justice Harlan said, in effect, that when a policy contains contradictory provisions, or has been framed so as to leave room for construction rendering certain things doubtful, the courts should lean against the construction imposing a warranty on the assured; that the company's attorneys, officers and agents prepared the policy, and the

language which the court must interpret is its language, and it is both reasonable and just that its own words should be construed most strongly against it. We would be blind to patent facts,—that those engaged in the production of oil send agents armed with printed leases to solicit leases, and they take leases for great areas, and they are forms already prepared, and the people in many instances know little of them, are inexperienced in oil operations, and are without legal advice. They rely on the agent. These leases were prepared by such an agent taking leases for a large area. Harness and wife swear that they asked that the words "or the rental paid thereon" be stricken out, but the agent assured them it was unnecessary, because the leases with these words in could not run longer than two years unless in that time oil was gotten, and, relying on this assurance, they signed. True, the law says one signing a writing must know the law of it; but I use the arguments to show that, if there were doubt, it ought not to be construed most strongly against the lessors,—a rule having little or no force in case of indentures, or in any case (2 Pars. Cont. 507),—but against him who solicited and prepared the lease. We are supported in our construction of this lease by a decision of the supreme court of Pennsylvania upon a lease almost exactly like this, containing the habendum clause, "To have and to hold the said premises for the term of two years from the date hereof, and as much longer as oil or gas is found in paying quantities, or the rental paid thereon." It provided that the lessee should commence a well within 30 days, and complete within that time, "or, in default thereof, pay to the party of the first part for further delay an annual rental of sixty dollars, payable quarterly in advance, from the time for completing a well until such well shall be completed." It will be noted that this lease is stronger than the one we have in hand in favor of lessee, because it in terms calls the money payable in default of boring "rental." The court held the term to end at the close

of two years, and that the lessee could not, in the absence of boring, prolong it by paying the $60 annually. *Gas Co.* v. *George*, 161 Pa. St. 47, 28 Atl. 1004. This is point-blank authority against the appellees in the construction of the lease in this case.

It is but fair to notice an argument to the effect that the Harnesses received the commutation money for thirteen months after the two years, and that, where the construction of an instrument is doubtful, the acts of parties under it afford good ground to give it that interpretation indicated by such acts. It is true as laid down in *Caperton's Adm'r* v. *Caperton's Heirs*, 36 W. Va. 479, 15 S. E. 257, that such acts of the parties who made an instrument, and knew its purpose, are a forceful clue to get at the meaning. But such acts lose force when done under protest, or with express declaration that the contract means another thing, as in this case; for, a few days after the end of the two-years term of the leases, Mrs. Harness wrote Bettman & Watson, asking them to return her lease, as the same had expired by limitation, and she and her husband desired to have the same returned and canceled. Early compliance was asked. Very plain was this of her and her husband's interpretation of the lease. On the same date of Mrs. Harness' letter to them, Bettman & Watson wrote Mr. Harness a letter, inclosing one for his wife, containing statement of rentals paid, with receipts to be signed therefor by them, telling them their money was in bank, expressing surprise that they had refused to receive "the letters." It seems from this they had sent letters or receipts before, which had been refused. To this letter she very promptly replied that she was anxious to have an interview at their earliest possible convenience, as she and Mr. Harness wanted a more definite understanding. Bettman & Watson replied that they did not know what she meant by wanting a more definite understanding, that the leases constituted that, insisting that under their provisions they

had paid the monthly sums, and that they had the right thus to extend the leases; that they intended to retain their leases until operations in the vicinity, "or possibly on your farms," should prove there was no oil, thus, while insisting on their construction of the leases, inspiring a hope in the breasts of Harness and his wife that they would likely soon bore on these lands. In affidavits, Harness and wife say they told Watson at the end of the two years that the leases were out; that they had importuned Watson often during that term to go on to work; that, in an interview after the two years, Watson claimed that the leases were yet in force, and, she denying it, and claiming that he ought to surrender the leases, he made excuses for not boring in the two years, and asked that a little more time be given, promising to go ahead with work, and she and her husband, relying on his promise, agreed to accept monthly payments for a while longer, with the understanding that, if they would proceed during any month for which advance payment was made, their rights under the lease would be continued as long as oil or gas should be found; that this went on for a third year, and, no work being done, she and her husband declined to receive further payments; that, later, Watson asked them what they would take for new leases, and a sum was named, but he did not agree to it, but said he was going to New York, and would consult the firm, and asked what was the least they would take, and she said she would make liberal reduction from that sum, as they had once leased their land; that, Watson not returning by the time fixed, they concluded he had abandoned all thought of making new leases, and had abandoned all claim under the old, and she and her husband made the lease to Finnegan. Under these facts we are bound to say that Harness and wife did not construe the leases as calling for an extension by payment of monthly sums, and their acts in receiving them do not show that they so construed the leases.

Another subject. Much as I have said, in deference to the

elaborate argument of counsel, and in view of the practical importance of the case, another point is to be settled, which is urged with zeal by counsel for appellees; that is, the doctrine of equitable estoppel. The claim that as the lessors accepted, for thirteen months after the two years, the payment of the sums of $15 and $5 each month, the plaintiffs are barred of relief. What effect can such payments work? We have concluded that those payments did not prolong the leases, and thus they are gone. Such payments cannot create a new estate, unless it be a tenancy from year to year. If they create any other estate, what? Is it a term of years? If so, how long? No term was fixed, but was negatived. A letting for a term must fix the term to be a lease for a specific term. Tayl. Landl. & Ten. § 75. It could not be a term of two years, because that required a writing. But is it a tenancy from year to year? Where there is an intent to create a tenancy, and no term is fixed, it is a tenancy from year to year, generally; but there must be such intent. In this case, if we believe Harness and wife, as opposed to Watson, we have to say that it was only agreed that the lessees were to have a few months longer, to go on to develop, but conditional upon that, with power in the landowners, certainly after a reasonable time, to close this state of things. There was no intent to create a new tenancy of any kind. It was merely a tenancy at sufferance of Harness and wife. Tayl. Landl. & Ten. §§ 54, 59.

Estoppel. Appellees' counsel relies with earnestness, apparently with more confidence than on the terms of the contract, on the doctrine of equitable estoppel arising from the acceptance by the lessors of monthly payments after the expiration of the two-years term. They say equity will not permit the lessors to receive this money, knowing that Bettman & Watson claimed that their lease would extend over two years so long as monthly payments were made; thus acquiescing in such construction of the leases, and inspiring them

with the belief that such was the construction and consent of the lessors. That might be true, if the facts just above given did not show that Harness and wife had repudiated that construction, and Bettman & Watson knew they had, and only received that money under protest against that construction, and that, denying that construction, they would only allow a few months payment as a grace, on the condition that drilling be done. We are quoted Bigelow, Estop. § 642: "A party cannot occupy an inconsistent position, and, where one has an election between several inconsistent courses, he will be confined to that which he adopts." But suppose he adopts one construction, lets the other party know it, and only does what is alleged as an act of estoppel with a specific understanding known to both. It is of the essence of estoppel by conduct, where one alleges that the conduct of another has misled and betrayed him, that the former should be inspiring false belief and confidence in that other; and it cannot apply where that other's eyes are open to the true state of things, and he knows the truth about the thing as to which he alleges he was misled, and knows the other man did not intend to inspire false confidence. Point 5, *Bates* v. *Swiger*, 40 W. Va. 420, 21 S. E. 874; *Mason* v. *Bridge Co.* 28 W. Va. 639, 649; *Graham* v. *Thompson* (Ark.) 18 S. W. 58; Bigelow, Estop. 626. Harness and wife give affidavits that they told Watson, from first to last, that the leases were out, and his claim of right to extend not tenable. Two swear so against one. That Harness and wife did so is probable, because we know they so claimed, from letters of both sides, which letters cannot swerve from truth, and it is not likely the Harnesses yielded this point afterwards, when they say, and we cannot help but know, that their great object was to have the oil developed on their land. How very improbable that they would dispense with boring for perhaps many years, and thereby lose perhaps great wealth for a merely paltry amount. Harness and wife stated no fact falsely, and to make an estoppel

there must be a false statement of facts, not of law. *Mason* v. *Bridge Co.*, 28 W. Va. 639. One side knows the facts as well as the other, and both sides were bound to know the law of the lease. We cannot say there is an estoppel unless we give it the phase of a promise by Harness and wife that they would abide by Watson's construction; and that is disproven. They told him just the reverse. To constitute an estoppel, the party claiming it must have acted upon the statement or conduct of the other differently from what would have been his course without such statement or conduct. What was the conduct of the Harnesses here? No statement, no false representation; only taking the money. Bigelow, Estop. 630. They took that, not of their motion, but at Watson's importuning solicitation, as a favor to him to give a few months longer for drilling. If they had not received it, Watson would have paid in bank, as he did when Harnesses refused to receive further. So, their action did not induce this payment, but Watson risked that. The Harnesses did nothing unjust or unconscionable, for which equity should visit them with the penalty of giving any one leave to defer development for years on payment of a small sum, defeating their object in making the leases, and allowing the lessees, by their wells on adjacent land, to drain off all the oil from their land. What wrong have the Harnesses done? "Equitable estoppels only arise when the conduct of the party estopped is fraudulent in purpose or unjust in result. * * * The fundamental principle upon which this doctrine is based is the equitable one,—the suppression of fraud and the enforcement of fair dealing." Herm. Estop. §§ 862, 865. Where was any bad intent in the Harnesses in taking this money? Watson paid with eyes open. Id. 833. Where is any injustice, or even hardship, on Bettman & Watson? They say they have paid large sums in these monthly payments. They were only those nominated in the bond, so far as the two-years term is concerned; and beyond that only the same amount per month, and received as

a favor and grace to them. They omitted, for reasons known to them, to use the leases by development. Any hardship on them is self-imposed. I must not omit to show a marked distincton between this case and *Hukill* v. *Myers,* 36 W. Va. 639, 15 S. E. 151, cited as binding us to recognize an equitable estoppel in this case. That is no authority in this case. In that case was a lease for 20 years, with duty of boring within a year or paying monthly sums, and, both failing, calling for a forfeiture. We held that receiving money after it was due was evidence of intent not to exact, but to waive, a forfeiture. It was a question whether there was a forfeiture, the term not being ended. Here it is not at all a question of forfeiture, but a question whether the lease is by its term ended.

So, we hold that there is no ground to raise an equitable estoppel. This renders it needless to discuss the question, if there were such estoppel as between the parties, whether its effect would be to continue the leases, which were recorded, and known to Finnegan, or whether it would create a new estate, and as such be void as to Finnegan as a purchaser for value without notice, and whether he was such purchaser.

We reverse the order overruling the motion to dissolve the injunction, and dissolve the injunction, and, as the bill is purely an injunction bill, *we dismiss it.*

JOHN T. ST. CLAIR V. THE CASH GOLD MINING AND MILLING CO. ET AL.

(9 Colorado App. 235; 47 Pac. 466. Court of Appeals. December 14, 1896.)

Res adjudicata. Title eliminated. After judgment in ejectment the only question in an action against the trespasser is the amount and measure of damages.

Question of nominal damages. It is error to instruct a jury to give nominal damages where plaintiff proves the trespass and the amount depends (among other things) on the credence given to defendant's testimony, showing the cost of mining to be equal to the ore values taken—although such evidence of the defendant is wholly uncontradicted.

The only cost of mining which trespassers are allowed to deduct from the value of the ore is "the actual expense of taking the ore out;" with tramming and hoisting.

[1]**The measure of damage depends on the good or bad faith** under which the ore was taken: The distinction between the two classes of cases stated.

Where a locator works into a patented claim he is liable to the highest limit of recovery unless able to show honesty of purpose and good faith.

Confusion of ore. In an action to recover for ore taken under a mistake as to ownership, where it appears that such ore was mingled with ore to which defendant was legitimately entitled, so that plaintiff was entirely unable to separate it, defendant must show how much came from plaintiff's vein and how much from his own, or plaintiff may recover the value of all the ore shown by his own evidence to have been taken out.

Special instruction in such case. In an action to recover for ore taken by trespass, and mingled with ore to which defendant was legiti-

---

[1] *Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; 39 N. E. 541. *U. S.* v. *Homestake Co.* 117 Fed. 481.

Lots of stone intermingled. *Williams* v. *Morrison*, 32 Fed. 177.

Gold from one claim mixed with gold from another. *Hawkins* v. *Spokane Co.* (Idaho) 33 Pac. 40.

The maxim "omnia contra spoliatorem" does not apply against mill men on account of the fact that in the process of milling the ore is destroyed. *Fox.* v. *Hale Co.* 108 Cal. 369; 41 Pac. 308.

Confusion of water. *Herriman Co.* v. *Butterfield Co.* 19 Utah 453; 57 Pac. 537.

mately entitled, where defendant has introduced evidence of work done and ore taken from his own vein, in order to reduce, to the extent of its value, plaintiff's recovery, the jury should be instructed to consider such evidence only so far as it might aid them in determining, if possible, what proportion of the ore came from defendant's vein.

Error to District Court, Boulder county.

Action by John T. St. Clair against the Cash Gold Mining & Milling Company and others to recover for ore taken by trespass. From a judgment in favor of defendants, plaintiff brings error. Reversed.

L. C. ROCKWELL, for plaintiff in error.

RIDDELL, STARKWEATHER & DIXON, for defendants in error.

BISSELL, J. The matters of fact exhibited by this record are free from complications, the questions of law thereby suggested are not of great difficulty, and the modern authorities of recognized force are in harmony about them. The errors apparent in the record proceed from an instruction which took from the jury the right to pass on questions of fact raised by the evidence, and the refusal of the court to advise them as to the law by which their deliberations were to be guided, and the admission of evidence which is neither relevant nor competent. The assignments do not suggest the errors which spring from the admission of the testimony, but the retrial which must follow the reversal renders the discussion of these matters both legitimate and essential. These suggestions outline the course which the opinion will pursue.

The parties were the owners of mining claims situate in Boulder county. The locations were on a mountain, which ran to the north and to the east, and were laid along its general course. The Bella, which was owned by the plaintiff in error,

ran north, 22 degrees 12 minutes east. This claim was of the usual size, being 1,500 feet long by 150 feet wide. About 200 feet from its southern end line, it crossed the Cash vein, and ran in such a manner that one of the Bella side lines projected from the southerly side line of the Cash about 200 feet from the end, so that the easterly side line of the Bella crossed the Cash about 200 feet from the Bella southerly end line, and its westerly side line crossed the Cash about 15 feet from the same end. The Cash vein which was one of the oldest locations on the hill ran northerly, 59 degrees and 22 minutes east, was 50 feet wide, and crossed the Bella at the points already indicated. Both these claims were patented. No question arises in the case with reference to the rights of the owners of the Bella and the Cash to what is known as the "Cash vein," or to the right of the Cash owners to follow their vein within the limits of the Bella location. The Berkin location was unpatented, and laid across both the Cash and the Bella, running north, 41 degrees east, so that it crossed both the easterly side line and the southerly end line of the Bella very close to the southeast corner or corner No. 1 of the Bella lode. The Berkin discovery adit, as appears from the testimony, was immediately at the southerly end line of the Bella, and from its commencement reached the Bella end line in about 12 feet. Whatever may be said about these respective locations and the work that was done is stated for the purpose of illustrating the present controversy, and exhibiting the basis on which the case was tried and the contentions of the respective parties. All matters of difference, as between the Bella, the Berkin, and the Cash, with respect to the rights of the Bella owners in the workings, which will be hereafter referred to, are entirely eliminated, and are of no consequence in the settlement of the dispute. This comes from the fact that the Bella owners brought an action in ejectment against the alleged trespassers, and got a verdict which settled their title and established their right to the

vein in which the work was done and their right to the ore which was taken out by the alleged trespassers, and leaves only the naked question as to what the Bella people were entitled to recover, the true measure of their damages, and the rules by which the jury must be governed in the ascertainment of the facts. The general nature, course, and direction of the work must be stated, in order to show on what basis the court below proceeded, and to determine the true rule, as we believe it exists, by which the recovery must be measured. After the commencement of this discovery adit, and on the assertion of what was claimed to be a right to pursue a cross lode, they then ran a level from the discovery adit, from the end line of the Bella, northerly across the Cash and beyond the northerly side line of the Cash lode. Sometime in the prosecution of this work, the Cash owners became convinced that there might be some value in the Berkin location, and that it could be secured more advantageously and economically through their workings, which were between 200 and 300 feet deep, than from any surface workings of the Berkin owners. The owners of the Berkin, at that time or shortly afterwards, sold the claim to the Cash owners, and consolidated with it, so that the property was thereafter called the "Cash-Berkin." When the Cash-Berkin consolidation pursued their explorations underground, they connected the workings of the Cash vein proper, which had been prosecuted to a considerable depth in the Cash lode, by running levels from their main working shaft and cross cuts from those levels to what was asserted to be the Berkin vein, and, when they got into it, took from that vein a very considerable quantity of ore. It is this trespass which is the basis of the present action.

The plaintiff brought suit, and to maintain his case compelled the Cash-Berkin consolidation to produce the books, which showed the extraction of ore, during the time and within the periods complained of, in amount to a little up-

wards of $14,000. Evidence was offered which showed that, during all the time the Cash-Berkin consolidation was prosecuting its work both within the limits of their own rights on the Cash vein, as well as the development of the particular vein which was claimed as the Berkin, the ores were mixed and sold as belonging to one common property, and it was impossible, from any records which were kept, to sift out and determine what ore was taken from the Bella vein and what from the Cash. The plaintiff, St. Clair, attempted to charge the company, under the doctrine in *Little Pittsburg M. Co.* v. *Little Chief M. Co.*, 11 Colo. 223, 17 Pac. 760, with all the ore extracted, and its total value as shown by the books, except as the defendants might be able to reduce it by separating, and establishing to the satisfaction of the jury, what came from the one vein and what from the other. The defendants recognized the force of the rule, assumed the burden of proof, and attempted to meet its responsibility. In order to do it they introduced evidence tending to show the cost, extent, and value of the work done on the Cash property and on the Cash vein, and the extent and value of the work done on the Bella vein, and that the ore coming from both sources was about equal, and that the expenses absorbed all the outcome. In a certain sense and in a certain way, possibly, this was legitimate. It will be discussed further on in the opinion. The evidence offered showed the value and extent of the cross cuts to strike the Berkin vein, and the necessity to prosecute this work of development from the Cash, in order to get at the Berkin to work it. The evidence tended to show the pay rolls and supply account during all this time, and the general expenses incident to this method of development. The evidence was objected to, but it was permitted to be offered. The plaintiff introduced no evidence contradicting this testimony, for, probably, there was none accessible to him, and he was compelled to accept the statements which the defendants made.

On the conclusion of the evidence the plaintiff asked a good many instructions, which were all refused, some of which will be subsequently stated, and the court, then, on the defendant's request, instructed the jury "that, from the uncontradicted evidence in this case, and the law as applicable to such evidence and to the case made by the pleadings, the defendants are entitled to abate the damages for the value of the ore taken out of the Bella vein to the extent that they have incurred expenses in mining, extracting, and milling said ore, and that the uncontradicted evidence shows that the cost of mining, milling, and extracting said ore exceeded the value of the ores extracted. You are therefore instructed that the plaintiff can recover only nominal damages for the trespass alleged in the complaint. You will therefore return a verdict for the plaintiff and against the defendants, and will fix the amount of damages at one dollar." This instruction was excepted to, and to give it was undoubtedly error. By it the court took from the jury the entire question as to the cost and expenses of extraction and the value and character of the ore taken, and refused to submit to the jury the real basis of the controversy, and on which the plaintiff was entitled to a finding. Whatever the jury may have concluded, and whether any other verdict than one for nominal damages would or would not have been sustained by the court, the defendants were entitled to have the jury find the amount of the ore taken, its value, and the cost of its extraction. Although the evidence of the defendants may have been entirely uncontradicted, it by no means follows that the jury would have allowed the totality of the expenses as exhibited by the proof offered. The instruction was equally faulty in another particular, because it did not advise the jury that the only expenses with which the defendants should be credited were the actual expense of taking the ore out of the Bella lode, providing they were entitled to limit the recovery by the extent of this cost. All the items of expense, with

reference to the running of drifts, levels, etc., to reach the Bella vein, should not have been before the jury, unless it was for the sole purpose of showing that the cost of extraction equaled the extent of the value of the ore taken from the Cash lode. Whether this would be at all proper would depend very much upon circumstances, and it was not admissible for the purpose of limiting the plaintiff's recovery by this cost, except in so far as it was an actual part of the legitimate expenses of taking the ore out of the Bella vein. In other words, the plaintiff was entitled to recover the value of all the ore taken from the Bella less only the actual cost of digging that particular ore out of that particular vein, tramming it to the bottom of the shaft, and hoisting it to the surface. Whatever expense the Cash owners may have been to in running their levels, drifts, and cross cuts to reach the Bella vein, were no part of the cost which could be rightfully or legitimately added to the expense of extracting the Bella ore. When a trespasser enters on a vein to which he has no title, and takes ore therefrom, he cannot charge the person whose property he has thus invaded with the expenses of the exploration incidental and necessary to finding it or reaching the vein which he spoliates by his trespass. It was, therefore, true this instruction could not have been legitimately given without the limitation that the only expenses with which the defendants could be credited were the actual expense of extracting from the Bella vein the ore for which they were sued. It is this evidence with reference to this matter which was objected to, and admitted over the objection, and respecting which there is no assignment of error. It has been referred to so that the court below, on the subsequent trial, will be guided by this opinion, and therefrom determine the legitimacy of the evidence which the defendants may offer on this subject. By this instruction the court usurped the function of the jury, took the entire case away from their consideration, and for this action we have been

unable to find any precedent in the books, nor has one been cited to us by the learned counsel who represents the defendants in error.

There are other equally fatal errors which will compel a retrial of the case. It is always true that the measure of damages for a trespass of this description is widely variant in two different classes of cases. In both of them the burden is with the defendant to show what he did, the value of what he took, and thereby limit the recovery. Our own supreme court has settled this proposition in the case hereinbefore referred to. It has been settled that a recovery on an innocent trespass is based on a totally different rule from one which is not the result of an honest mistake, and is, therefore, a willful trespass, within the ordinary legal acceptation of this term. In the first class of cases the defendants are undoubtedly compelled to pay only the value of the ore as it was in the mine, and therefore they can limit the recovery —First, by the value of what is taken; second, by the cost of mining and extraction, tramming, and hoisting to the surface, or delivering it at the pit's mouth. This is the value of the stuff to the plaintiff, who would be compelled to stand these expenses if he had mined the ore himself. In this statement there has been no mention of the cost of reduction, for, while this is usually a legitimate item of deduction, it is unimportant to the present discussion. On the other hand, if the defendants had taken out the ore, not as the result of an honest mistake or an honest intention, but under circumstances which showed that they had knowledge of the situation, or the circumstances were such as to legally charge them with this knowledge, they are entitled to no such deduction, and they may not reduce the amount of recovery by proving the cost of mining. Having been guilty of a willful trespass, they shall reap no benefit from their own wrong, and shall pay the value of the ore without credit for the labor incident to its extraction. This doctrine is too well settled to

admit of controversy. *Waters* v. *Stevenson,* 13 Nev. 157; *Manufacturing Co.* v. *Moses,* 15 Lea, 415; *Wooden-Ware Co.* v. *U. S.,* 106 U. S. 432, 1 Sup. Ct. 398; *Benson M. & S. Co.* v. *Alta M. & S. Co.,* 145 U. S. 428, 12 Sup. Ct. 877; *Jewitt* v. *Dringer,* 30 N. J. Eq. 291; *Little Pittsburg M. Co.* v. *Little Chief M. Co., supra.*

To bring this issue clearly before the jury, and to guide their deliberations, the plaintiff asked some instructions which charged the jury as to the respective rights of the parties, the burden of proof, and the duty of the defendants to find out and ascertain where they were working, and on what lode they were working, and the good faith with which they did it, and charging the jury that, unless they found that the defendants began the work under the honest belief that they were working on their own ground, where they had a right to work, they were not entitled to reduce the recovery by the expenses of mining it. The plaintiff was undoubtedly entitled to instructions on this subject. The seventh instruction which the plaintiff requested put this question of good faith before the jury in an intelligible and tolerably satisfactory shape, and the plaintiff was entitled to have the jury instructed on that theory. The situation of the case warranted it. The entry by the Berkin owners across the end line of a patented claim, and the pursuit of that development within its limits, was not done in ignorance of the plaintiff's rights; and in doing that work the defendants took the chances of being called on to respond in damages for whatever they might take out, without regard to the cost of extraction, unless they were entirely able to satisfy the jury that what they did was done in the utmost good faith, and on a fairly well founded belief of what they claimed were their rights. Locators of mining claims which are projected across patented property take all the risks incident to the pursuit of ore within the limits of that claim, and, being found to be trespassers, must respond in damages to the highest limit of re-

covery unless they are able to satisfy the jury of the honesty of their purpose and the good faith with which they did their work. Manifestly, under such conditions as appear in the record, the plaintiff was entitled to have the jury told what the plaintiff's rights were under such circumstnces, and the court was bound to submit to the jury the question of good faith, of honest purpose and fair intention, and tell the jury that, unless they reached the conclusion the trespass was not a willful one, the whole evidence in regard to the cost of extraction was entirely foreign to their deliberations, and should not be taken into account in determining what the plaintiff might recover.

The plaintiff was likewise entitled to an instruction which he asked with reference to the burden of proof respecting the value of the ore which came from the Bella. The defendants having taken the ore by trespass, and mingled it with the ore to which they were legitimately, entitled, so that the plaintiff was entirely unable to separate and distinguish and estimate it, the burden was on them to show how much came from the Bella and how much came from the Cash to the satisfaction of the jury. Unless the defendants were able to satisfy the jury on this question, the plaintiff might recover the value of all the ore shown to have been taken out, and the plaintiff's recovery was limited only by his own evidence on this subject. The defendants undoubtedly had the right to show what work they did in the Cash vein, and what ore they took out, so as to give the jury all the light possible respecting the extent and value of the ore which came from the Cash lode, and the extent and value of the ore which came from the Bella. If, from this evidence, the jury were able to separate and determine the value of each, then the recovery might be limited to what they should conclude to be the extent and value of the ore taken from the Bella lode, less whatever legitimate expenses were properly chargeable as against that ore on the lines which are herein indicated. Not otherwise

was the evidence respecting the ore taken from the Cash and the work done on it admissible or legitimate. The jury should be plainly told that the cost of the work done on the Cash vein was wholly unimportant, and beside their consideration, except as it might aid them in determining therefrom, if they were able to, what ore came from the Cash lode, that to the extent of this value the plaintiff's recovery should be reduced.

For the manifest errors which the court committed in taking the case from the jury, and in refusing to instruct them on essential matters, this case will be reversed, and sent back for a new trial.

Reversed.

ALEXANDER TAYLOR v. LEWIS P. PARENTEAU, ET AL.

(23 Colorado 368; 48 Pac. 505. Supreme Court. January 4, 1897.)

Verdict in suit supporting adverse claim. In determining the sufficiency of the verdict it is to be considered in its entirety. The verdict set forth in the opinion contains all that is requisite.

Counsel assisting in preparing form of verdict. A party whose counsel assisted in the preparation of a form of a verdict and who failed to point out an alleged defect before it was given to the jury, or to ask for its correction when returned into court, will be held to have waived objection thereto on account of form.

Chisel mark instead of corner post. The statute requires that the surface boundaries of a mining claim shall, except under specified circumstances, be marked by six substantial posts hewed or marked on the sides which are in toward the claim, sunk in the ground,—one at each corner and one at the center of each side line. The cutting of an initial letter into a solid rock at the corner of the claim or at a given distance therefrom is not equivalent to the sinking of a post in the ground, or, where that cannot be done by reason of bed rock, planting one in a pile of stones.

Error in a single instruction is not material where the charge as a whole is both correct and intelligible.

Annual labor done on an adjoining claim having a tendency to develop the claim in controversy will avail. (And work by *stoping* was held properly left to be considered by the jury on this point.)

[1]**The location of a width greater than the legal distance** allowed on either side of the crevice makes the location void as to the ground embraced in the excess.

Appeal from the District Court of Gilpin County.

This was an action brought by Alexander Taylor, as the owner of the Spur, Sucker and Sophia mining locations, situate in Gilpin county, Colorado, in support of an adverse

[1]Lode claim was staked off easterly 150 feet more than call and exceeded legal width; the west end was substantially correct; the ground was difficult. *Held*, valid. *Burke* v. *McDonald*, 17 M. R. 325.

An excess in length does not vitiate except as to the excess, but where excess is so great that the end stakes cannot be found after

claim filed by him in the United States land office against the application for patent of the Baby Ruth lode, owned by the defendants. There were three separate causes of action in the complaint, each counting upon the title of the respective lodes owned by the plaintiff, and the territory in conflict is a small parcel situate within the exterior boundary lines of, and is ground common to, the four locations.

There was a verdict and judgment for the plaintiff for a portion of the conflicting property, and for the defendants as to the remainder. From this judgment the plaintiff prosecutes his appeal to this court.

L. C. ROCKWELL and CHASE WITHROW, for appellant.

TELLER, ORAHOOD & MORGAN, for appellees.

JUSTICE CAMPBELL delivered the opinion of the court.

The errors assigned and argued relate to the form of the verdict and the judgment, and to the instructions given by the court at the defendants' request.

1. The first part of the verdict is: "that plaintiff is the

search within several hundred feet it is not a valid staking. *Ledoux* v. *Forester*, 94 Fed. 600.

A claim in excess of statute is void only for the excess. *Gohres* v. *Illinois Co.* 40 Oreg. 516; 67 Pac. 666.

Stake at each corner and center of each end is enough. In excessive staking the claim is void only as to the excess. *Howeth* v. *Sullenger*, 113 Cal. 547; 45 Pac. 841.

An excess of 300 feet in length in staking and a like excess of 50 feet in width, where made without bad faith and the notice claiming only the legal amount does not invalidate the claim. *Hansen* v. *Fletcher*, 10 Utah 266; 37 Pac. 480.

Location of excessive feet not void. *Rose* v. *Richmond Co.* 17 Nev. 25; 27 Pac. 1105.

A location is not void for excessive width and a second locator on such pretense cannot take in the actual workings of the first locator. *McIntosh* v. *Price*, 121 Fed. 716.

owner and entitled to possession of the following described part and parcel of the premises in controversy in this case" (here follows the description). Immediately thereafter comes the following: "as to all the remainder of the premises in dispute we find the issues for defendants, and that defendants are the owners of the Baby Ruth lode as described in the answer and location certificates thereof in evidence, with the exception of the premises as above stated (being that awarded to plaintiff), by virtue of full compliance with the local rules, the laws of Colorado, and of the United States, and by right of prior legal appropriation, preëmption and location."

That part of the verdict relating to the defendants' parcel is not found fault with, but the criticism goes to that portion concerning the award to plaintiff, and is that the verdict does not state "by what right plaintiff was entitled to the ground he obtained, and such omission is fatal." To this are cited *Manning* v. *Strehlow,* 11 Colo. 451; *McGinnis* v. *Egbert,* 8 Colo. 41; and *Drake* v. *Root,* 2 Colo. 685. They are not in point.

Counsel is in error as to the construction he puts upon this verdict. It must be considered in its entirety. The concluding portion, "by virtue of full compliance with the local rules," etc., applies as well to the ownership and right of possession of the plaintiff as to that of the defendants. That is to say, not only the defendant's, but also the plaintiff's, ownership and possession are "by virtue of full compliance," etc. But if this were not so, the plaintiff is in no position to complain. The alleged error pertains to a verdict in his own favor. His counsel assisted in preparing its form and made no objection to it when submitted to the jury or when returned to the court. If he was dissatisfied with the form, he should not have so framed it, or should have pointed out the alleged defect before it was given to the jury, or asked for a modification and correction of the ver-

dict when returned into court. Having then neglected this duty, the objection must be considered as waived upon this appeal. For the same reasons, the objection to the judgment, which conforms to the verdict is without merit. 2 Thompson on Trials, sec. 2684; *Algier* v. *Steamer Maria,* 14 Cal. 168; *Water Co.* v. *Richardson,* 72 Cal. 598; *Little Josephine M. Co.* v. *Fullerton,* 58 Fed. Rep. 521.

2. Section 3153, Mills' Annotated Statutes (Gen. Stats. '83, sec. 2402) provides that the "surface boundaries shall be marked by six substantial posts hewed or marked on the side or sides which are in toward the claim, and sunk in the ground, to wit: one at each corner and one at the center of each side line. Where it is practically impossible on account of bed rock to sink such posts, they may be placed in a pile of stones, and where in marking the surface boundaries of a claim any one or more of such posts shall fall by right upon precipitous ground, where the proper placing of it is impracticable or dangerous to life or limb, it shall be legal and valid to place any such post at the nearest practicable point, suitably marked to designate the proper place."

In the attempt to comply with this statute, the locators of the Sucker lode placed no stake or post at one of the corners of the location. Counsel for appellant in his argument here, and the trial court in its instructions to the jury, assumed that the letter "S" was cut into the solid rock at the corner itself; but an examination of the entire evidence upon this point satisfies us that this letter was cut into rock, not at the corner, but at a point twenty-seven degrees northwest therefrom and at a certain distance designated in the location certificate.

However this may be, the court in effect instructed the jury that the cutting of this letter was not a compliance with our statute just quoted. While this does not present a case of misdescription, it is, we think, an insufficient compliance with the requirements of the statute referred to.

There is in this record no sufficient evidence that it was impracticable to place a post or stake at the corner, but if there was, the cutting of a letter into the solid rock, either at the corner or at a given distance therefrom, is not equivalent to planting a post in a pile of stones. There is no proof of facts which, under the statute, make valid the planting of the post at the nearest practicable point to the corner, suitably marked so as to designate the same; neither is there anything in the record, as to his knowledge of the surface boundaries, that would estop the locator of the Baby Ruth from questioning the validity of the Sucker location, notwithstanding the insufficient marking of the same. Doubtless for this reason it was that appellant's counsel neglected to ask for an instruction upon the theory that, in some cases, an estoppel would arise. The doctrine of the case of *Pollard* v. *Shively,* 5 Colo. 309, does not uphold the validity of a claim thus marked as to its surface boundaries; but rather this case comes within the principle of *Croesus M. Co.* v. *Colo. M. Co.,* 19 Fed. Rep, 78, which is authority for the ruling of the trial court.

3. At the trial the plaintiff voluntarily abandoned his cause of action founded upon the Sophia lode. In its instructions the court directed that as to the territory in conflict between this and the Baby Ruth lode, if the latter was a valid location, the finding must be for the defendants. This is assigned for error because the same territory, or, at least, a part of it, was also within the surface boundaries of the Spur and Sucker lodes. Were this instruction alone considered, there might be some reason for contending that the jury were possibly misled by it. But other instructions in effect advised the jury that the ultimate finding for the defendants as to this territory could not be made unless the Spur and Sucker lodes were, as to the Baby Ruth, also invalid. So we think it manifest that the jury understood the instruction complained of as applicable only as between the two

lodes designated, and they further understood that the defendants were not to prevail, unless they also proved the seniority of their own over the other two locations of the plaintiff.

4. Assessment work upon the Spur and Sucker lodes for a certain year was in controversy. Although the owner did no such work within the limits of the Sucker, he claimed that the work done upon the Spur (some of which was stoping) directly contributed to the development of the former as well as the latter. The law, as requested by the plaintiff, was given by the court, to the effect that if the work upon the Spur had a direct tendency to benefit the Sucker lode, if it was done by means of shafts and drifts upon the lode, and had such a tendency in the manner in which it was done, or under a general plan or system of mining the said Spur and Sucker lodes, and with that purpose in view, then neither of the lodes was subject to be relocated as abandoned property. *Hall* v. *Kearney,* 18 Colo. 505; *Doherty* v. *Morris,* 17 Colo. 105, and cases cited; *Smelting Co.* v. *Kemp,* 104 U. S. 636; *Chambers* v. *Harrington,* 111 U. S. 350 (s. c. 3 Utah, 94).

The defendants asked for, and the court gave, the same law in the negative form, to the effect that unless the work done upon the Spur directly tended to develop the Sucker, or was done for that purpose, it was insufficient to hold the latter, and that stoping in and taking out ore from the Spur cannot apply on assessment work on the Sucker unless done as aforesaid.

In the oral argument counsel for the appellant stated that the instructions as requested by the defendants, and given by the court, were that stoping in one claim *in no event* could be regarded as assessment work upon another; but the record shows that no such instruction was given, but, on the contrary, the same qualifications were inserted which the plaintiff himself asked the court to give in his behalf. These two

instructions are in substance the same, those of the defendants merely stating the opposite of the proposition embodied in the instructions asked by the plaintiff.

5. The principal contention arises over the instruction of the court that, under the law, the surface ground of a claim in Gilpin county cannot extend more than seventy-five feet in width either way from the center of the discovery shaft. Of this the appellant complains, because the proof was that the discovery shaft of the spur lode was about ninety-nine feet south of a point on the northerly side line of the location immediately opposite. This ruling took from the plaintiff all that part of the surface of the claim on its northerly side outside of a line, parallel to the side lines, seventy-five feet northerly from the center of the discovery shaft.

The argument of appellant is that, as under section 2320, R. S. U. S., a discovery and discovery shaft may be anywhere along the course of the vein and within the end lines, and may be much nearer one end line than the other, and it being further contended that since the side lines are not required to be straight, the vein at other places than the discovery shaft may be much nearer one side line than the other, it would be useless to require the discovery shaft to be within any given distance from either of the side lines. It is apprehended, if this section required the shaft to be equidistant from the end lines, a location in which the shaft was not so placed would be invalid.

Section 3148 of Mills' Annotated Statutes (Gen. Stats. '83, sec. 2397), however, permits the length of a claim to be fifteen hundred feet along the vein. As the location of the discovery shaft is not confined by this, or any other, provision to any specific point along its strike, the end lines, of course, need not be equidistant from the shaft. But by section 3149 the width of lode claims in Gilpin, Clear Creek, Boulder and Summit counties shall be seventy-five feet on each side of the center of the vein or crevice. As the discovery shaft

necessarily must be, and in this case was, upon the vein, it follows from the express provisions of the statute that, in the designated counties, where a claim may not be more than one hundred and fifty feet wide, neither side line may be distant from the vein or discovery shaft more, though it may be less, than seventy-five feet. It follows that as to a claim located in violation of this section, such parts of the surface ground as lie outside of a line parallel to the side lines and seventy-five feet from the discovery shaft are located without authority of law, and as to such excess, the location is void.

There is no room for construction of the language of this section. It interprets itself. We find no case directly in point, though our conclusions are in accord with the opinion of Mr. Morrison, in his work on Mining Rights, at page 21, (8th ed.). The case of *Jupiter M. Co.* v. *Bodie Con. M. Co.*, 11 Fed. 666 and 675, seems also to support our conclusion.

It follows that the judgment of the court below should be affirmed.

Affirmed.

[1]W. E. BARTLEY ET AL. v. THOMAS W. PHILLIPS.

(179 Pennsylvania 175; 36 Atl. 217. Supreme Court. January 4, 1897.)

[2]**Lessor alone can forfeit.** The clause of forfeiture or termination of the estate usually incorporated in oil and gas leases in this state is for the benefit of the lessor, and as against him no act of the lessee can work a forfeiture without his concurrence.

Parties who lease or buy oil or gas lands, with a term apparently outstanding, without inquiry of the lessee, and without the exercise of the lessor's power to forfeit, take the risk of the fact of abandonment of the first lease as the facts may be found by the jury.

Facts of the case. Defendant leased oil and gas lands from the owner. He had notice of the fact that there was an outstanding lease of ten years to plaintiffs, only three years of which had expired. The grantor of the lessor of defendant refused in his deed to assert a forfeiture of the first lease. Defendant made no inquiry of the plaintiffs as to whether their lease had been terminated. *Held*, (1) that the defendant had sufficient notice to put upon him the duty of inquiry; (2) that it was a question for the jury to determine whether there had been an abandonment of the first lease.

A parol agreement as to what shall constitute due dilligence or abandonment, is binding on purchasers from the lessor without notice, but with knowledge of the existence of the lease.

Right to swear to intention. In cases of contract a man may not testify as to what was his intention but in cases of fraud and of abandonment he may so testify.

Appeal from Court of Common Pleas, Butler county; Greer, Judge.

Ejectment by W. E. Bartley and others, trading as the Farmers' Oil Company, against Thomas Phillips and W. V.

[1]S. C. on former appeal, 18 M. R. 145.

[2]*Cases on the "null and void" clauses*

Where a lease provides in case of breach there shall be an absolute forfeiture, such provision is for the benefit of the lessor and the lessee cannot terminate the lease by electing to break the covenant. *Wills* v. *Mf'rs Co.* 130 Pa. 222; 18 Atl. 721.

Where a lease recites that for failure to perform its conditions it

Hardman to recover possession of premises leased to plaintiffs by J. A. Hartzell for oil purposes, and afterwards sold and conveyed by Hartzell to defendant Phillips. Defendant Hardman filed a disclaimer. From a judgment in favor of plaintiffs, defendant Phillips appeals. Affirmed.

CLARENCE WALKER, JOHN M. THOMPSON and W. C. THOMPSON, for appellant.

T. C. CAMPBELL, LEV. MCQUISTION and W. A. FORQUER, for appellees.

MITCHELL, J. It was decided when this case was here before (165 Pa. St. 325, 30 Atl. 842) that evidence to show the agreement between Hartzell and the plaintiffs as to what should constitute due diligence or abandonment was admissible,—not being an attempt to alter or modify the written agreement, but to define terms used therein. The effect of such an agreement as to parties subsequently acquiring title from Hartzell without notice was not decided, as the evidence

shall be null and void, followed by a clause, providing for forfeiture and default after a certain number of days the latter clause is the only one under which forfeiture can be enforced. *Westmoreland Co.* v. *DeWitt*, 130 Pa. 235; 18 Atl. 724.

A forfeiture clause is for the benefit of the lessor and the legal effect cannot be avoided by proof of the common construction of similar clauses by parties to oil leases. *Jones* v. *West Pa. Co.* 146 Pa. 204; 23 Atl. 386.

Lessee had the option "to drill said well or not or pay said rental or not as he may elect:" *Held*, that he must either sink or pay rent. *Jackson* v. *O'Hara*, 183 Pa. 233; 19 M. R.—.

The lessor must elect to declare a forfeiture, to render the lease null and void. *Edmonds* v. *Mounsey*, 18 M. R. 384.

But where the lease was to become void at a certain date if no well then sunk, unless rent was paid and there is no covenant to pay rent the lessee cannot be held for it. *Brooks* v. *Kunkle*, 24 Ind. App. 624; 57 N. E. 260.

And there may be a lease with the right to either party to determine it. *Diamond Co.* v. *Curless*, 22 Ind. App. 346; 19 M. R.—.

did not then show that any such party was before us. Now, however, the appellant has shown title subsequently acquired from Hartzell; and his main contention is that he was not put on inquiry, or bound by anything not contained in the written lease, and that the admission of evidence of a parol agreement between the parties to the lease would be, as to him, an alteration of the writing without notice.

This contention cannot be sustained. Appellant or his agent, it is admitted, had notice, in fact, of the lease. By it he was informed of an outstanding term in plaintiffs for 10 years, only 3 of which had expired. Whether the lease had terminated sooner, by abandonment or forfeiture, was a fact in pais, which could not be known from the lease, but only from evidence dehors. As to such fact, he was put on inquiry, and the only safe source of information was the lessees. He not only did not inquire of them, but Hartzell's deed gave him notice that the lessor refused to say there was a forfeiture. Under these circumstances, he took the risk whether there had been an abandonment or not, and the jury have found the fact against him. This court has firmly established in a line of decisions from *Wills* v. *Gas Co.*, 130 Pa. St. 222, 18 Atl. 721, to *Cochran* v. *Pew*, 159 Pa. St. 184, 28 Atl. 219, notwithstanding a most determined and persistent struggle of parties for a different rule, that the clause of forfeiture or termination of the estate is for the benefit of the lessor, and that, as against him, no act of the lessee can produce that result without his concurrence. Parties therefore, who lease or buy with a term apparently outstanding, without inquiry of the lessee, and without the exercise of the lessor's power to forfeit, take the risk of the fact as it may be found by the jury. In this case, as already said, no inquiry was made of the lessees, the lessor in his deed to Ziegler refused to assert a forfeiture, and the jury have found that there was no ground of forfeiture if the lessor had attempted one.

The case of *Venture Oil Co.* v. *Fretts*, 152 Pa. St. 451, 25

Atl. 732, is relied upon by appellant, but there is nothing in it inconsistent with the present view. There the lessor, after an apparent abandonment by the lessee, had made a new lease to other parties, and this court held that to be an exercise of his right to forfeit for abandonment. In the present case, as already said, the lessor made a deed for the fee in the land, but excepted out of the warranty the rights of plaintiffs under the lease.

It is further assigned for error that the court below permitted the plaintiffs to deny the abandonment by testifying to their intentions in dealing with the property as they did. This question is somewhat novel, having only arisen in its present shape since the recent changes in the common law by which parties are made competent to testify. In *Association* v. *Hetzel,* 103 Pa. St. 507, it was said by Trunkey, J.: "Under the rule admitting parties to testify in their own behalf, where the character of the transaction depends on the intent of the party, it is competent for him to testify what his intention was. His answer, of course, is not conclusive, but to be considered with other evidence;" citing authorities from New York and Massachusetts. In *Com.* v. *Julius,* 173 Pa. St. 322, 34 Atl. 21, the plaintiff, being met with a release, was asked what induced her to sign it, and was permitted to testify as to her motive and inducement. This was held not to be error. The distinction was carefully guarded between that case and one of contract, where it is settled that one party may not testify to an intent not disclosed at the time; "the thoughts of one party cannot be proved to bind the other." After reviewing the cases upon this last point, it is said: "This, however, is very different from testifying to the fact that false and fraudulent representations were the consideration or inducement to the party's action. This is one of the facts which is always part of the res gestæ, and which it was always competent for the party to prove. And, now that the party is a witness, there is no sound reason why he should

not prove it by his own testimony;" referring further to the analogous cases of proving that a contemporaneous parol agreement was part of the consideration of a written contract, and a vendor's rescission of a sale for fraudulent representations which were the inducement to sell, in both of which the fact that the agreement or representation was the inducement may be proved by the party himself. So, in *Weaver* v. *Cone*, 174 Pa. St. 104, 34 Atl. 551, an action for fraudulent misrepresentation by defendant of the price at which he had sold certain stock, in consequence of which plaintiff sold his at the price named, it was held that plaintiff was properly permitted to testify what induced him to sell. The point was made by appellant that whether the defendant's representation was the inducing cause of plaintiff's action was for the jury to determine from all the facts and circumstances, but that to permit plaintiff to state directly the secret motive which induced his action was giving him an unfair advantage, but this court held the testimony proper.

These cases seem to settle the present question in our state, and they are in accordance with the general trend of judicial decisions in states where statutes have made parties competent witnesses. In a note to *Gardom* v. *Woodward* (44 Kan. 758, 25 Pac. 199), in 21 Am. St. Rep. 310, authorities from Maine, New Hampshire, Massachusetts, New York, Maryland, Indiana, Iowa, Michigan, Minnesota, Wisconsin, and California are cited as holding such testimony admissible, and it is said that Ohio and Alabama are the only states in which a contrary view is taken.

In the present case there was no element of contract. The parties had no communication with each other, but acting independently on their several rights,—the defendant relying on his own judgment, from the appearance of abandonment; the plaintiffs, on their intentions as well as their acts. We see nothing either in sound reason or in the authorities to limit their general competency as witnesses to the latter. If

the jury was wrong in crediting their words, rather than drawing a different inference from their acts, the remedy is not with us.

Judgment affirmed.

MRS. JOSEPH MARSHALL v. A. W. MELLON ET AL.

(179 Pennsylvania 371; 36 Atl. 201. Supreme Court. January 4, 1897.)

Where no oil or gas operations have been commenced on land before an estate for life has accrued, the tenant for life has no right to operate for oil or gas himself and cannot give such a right to any person by lease.

[1]**New oil well—same rule as unopened mine.** A life tenant of oil and gas lands which had never been operated for oil or gas executed a lease for oil and gas purposes exclusively. The lessees did not operate the land, or perform any of the covenants of the lease, and refused to pay the rent stipulated. *Held*, that the lessor could not enforce the lease.

The lessor cannot recover rent upon a void lease.

Appeal from Court of Common Pleas, Allegheny county; Stowe, Judge.

Action by Mrs. Joseph Marshall against A. W. Mellon and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

W. H. S. THOMSON, A. P. MARSHALL and FRANK THOMSON, for appellant.

EDWIN S. CRAIG, for appellees.

GREEN, J. In *Stoughton's Appeal*, 88 Pa. St. 198, we said: "Oil, however, is a mineral, and, being a mineral, is part of the realty. *Funk* v. *Haldeman*, 53 Pa. St. 229. In this it is like coal, or any other mineral product which in situ forms part of the land." In *Gill* v. *Weston*, 110 Pa. St. 312, 1 Atl. 923, we said of petroleum, "It is a mineral substance

[1]Apportionment of royalties between life tenants and remainder men. *Blakley* v. *Marshall*, 18 M. R. 350. *Gerkins* v. *Kentucky Salt Co.* 23 Ky. L. R. 2415; 67 S. W. 821.

obtained from the earth by a process of mining, and lands from which it is obtained may with propriety be called mining lands." In *Gas Co.* v. *De Witt,* 130 Pa. St. 235, 18 Atl. 725, we said, "Gas, it is true, is a mineral, but it is a mineral with peculiar attributes." In *Blakley* v. *Marshall,* 174 Pa. St. 425, 34 Atl. 565, a lease for oil and gas purposes was made by lessors who were tenants for life, and also as trustees for those in remainder. The leased premises proved to be productive. A question arose, upon a case stated, as to the interests, respectively, of the life tenants and those in remainder. The life tenants claimed the whole of the oil, and for those in remainder the same claim was made. The court below appointed a trustee to receive all the oil due to the lessors, and to invest the proceeds, and pay the interest annually realized therefrom to the life tenants during their joint lives and the life of the survivor, and at the death of the latter to pay the principal to the remainder-men. This court sustained the court below, and said: "As was said in *Stoughton's Appeal,* 88 Pa. St. 201, and other cases in the same line, oil in place is a mineral, and, being a mineral, is part of the realty. An oil lease investing the lessee with the right to remove all the oil in place in the premises, in consideration of his giving the lessors a certain per centum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. If there be life tenants and remainder-men, the former are entitled to the enjoyment of the fund (i. e. interest thereon) during life, and at the death of the survivor the corpus of the fund should go to the remainder-men." This distribution was made because all the interests concurred in making the lease, and it was to the manifest interest of all that the oil should be taken from the land, lest it should be drawn away by other wells on adjacent premises. In that respect, of course, there is a difference between oil and gas and solid minerals; but in respect of the interests of life tenants, as contrasted with those

in remainder, there was no departure from the common-law rule that tenants for life only may not open new mines or take minerals from the premises, except in case of mines opened by the former owner. This was recognized in *Westmoreland Coal Co.'s Appeal,* 85 Pa. St. 344, where we held that, while the life tenant's right to work previously opened mines was undoubted, there was no right in a life tenant of several tracts to open a new mine on one of the tracts upon which no previous opening had taken place. Mercur, J., said, in the opinion: "Neither tract is appendant or appurtenant to the other. If she had a life estate in the distant tract only, the fallacy of claiming a right to remove the coal therefrom would be most manifest. The unanswerable reason would be that the mine on that tract had never been opened."

We see no difference between the present case and those cited, so far as this question is concerned. The plaintiff was but a tenant for life of the premises in question. There had never been any oil or gas operations commenced on the land before her estate for life accrued. She had no right, therefore, to operate for oil or gas herself, and she could not give such a right to any lessee from her. Neither the original lessee nor the defendants, his assignees, ever held any such right. They would have been trespassers if they had undertaken to exercise such a right. The lease was "for the sole and only purpose of drilling and operating for petroleum oil or gas," and "to have and to hold the said premises for the said purpose only." All the terms and conditions of the lease relate to that purpose alone, and no right to the use of the surface for any other purpose is conferred. It is manifest, therefore, that, as no interest whatever was acquired under the lease, the lessees are under no obligation to pay for a right or privilege which they never obtained, or in damages for not performing an illegal covenant therein. We think the judgment entered by the court below was entirely right.

It seems to us, however, in view of the peculiar character

of oil and gas, as being fugacious in their nature, and liable to be diverted by operations upon other adjoining or near-by lands, in order to preserve the interests of both life tenants and remainder-men it would be well for the legislature to make such enactments as would enable the owners of this class of lands to secure to themselves the benefits of such minerals as these. As it is now, the law is not efficacious to that end.

Judgment affirmed.

JAMES E. MATHEWS v. THE PEOPLES NATURAL GAS CO.

(179 Pennsylvania 165; 36 Atl. 216. Supreme Court. January 4, 1897.)

Rent payable until lessor declares forfeiture. In an oil lease for 20 years, which provides that, if a well is not commenced within three months, the lessee shall thereafter pay a specified monthly sum until work is commenced, a clause declaring that in no case shall the commencing of the well be delayed beyond six months, and that, if no well is begun within that term, the lease shall be forfeited, is for the benefit of the lessor, and, until he elects to enforce it, the lessee's liability to pay rent continues.

Lessor building on surface. The act of the lessor of oil lands in entering on the premises, and erecting a building in such a location as not to interfere with the future operations of a well the site of which was then marked with a stake, was not a declaration of forfeiture.

[1]**Conveyance is eviction.** An absolute conveyance of oil lands by the lessor, without reserving the lessee's right of entry to drill for oil, is a constructive eviction, which terminates the lessee's liability for rent.

Appeal from Court of Common Pleas, Washington county; McIlvaine, Judge.

Assumpsit by James E. Mathews against the Peoples Natural Gas Company to recover rent. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. & A. DONNAN and W. S. MILLER, for appellant.

M. L. A. MCCRACKEN, J. M. BRADEN, C. W. CAMPBELL, B. E. MCCRACKEN and J. MCGIFFIN, for appellee.

[1]A sale of land under a gas lease gives accruing rents to the vendee. *Chandler* v. *Pittsburg Co.* 20 Ind. App. 165; 50 N. E. 400.

The royalty from an oil well is "income" under a devise to tenants for life of testator's income. ***Estate of Woodburn***, 138 Pa. 606; 21 Am. St. 932.

Mine rents accruing during the life of the testator go to the executor, not the heir. *McDowell* v. *Hendrix*, 67 Ind. 513.

DEAN, J. The plaintiff, on 6th of February, 1886, leased to defendant, for oil and gas purposes, two vacant lots of ground in South Strabane township, Washington county, for the term of 20 years. The lots were intended for building purposes, and, although separated from each other 900 feet, both were in what is known as the "Gantz and Gordon Oil Pools," and producing wells had been drilled in proximity to them. The leases contained these provisions:

"The party of the second part covenants to commence operations on this land for said purpose within three months from the execution of this lease, or thereafter pay the party of the first part fifty (50) dollars per month until work is commenced, to be paid each month in advance; * * * and, after work is commenced, it is to be prosecuted with due diligence until completion." * * *

"It is mutually understood and agreed by both parties hereto that in no case shall the commencing of a well on the above-described land be delayed beyond a period of six months from date of this lease, and, if no well is commenced inside of said six months, the penalty to be a forfeiture of this lease, and neither party being held further. And it is further understood and agreed that a well drilled on either of above described lots will hold the lease on the other lot for the full term of lease."

The first month's rental was paid, but thereafter no further rental was ever paid, nor was demand made until this suit was brought, on 23d of January, 1895, nearly nine years afterwards. About one year after the date of the lease, 20th February, 1887, the plaintiff entered on one of the lots and built a house; but the evidence tended to show that at this time a stake had been set by defendant indicating the site of a future well, and that the building would not have materially interfered with the operation. On the 6th day of February, 1889, however, just three years after date of lease, plaintiff conveyed by deed, one of the lots to John D. Porte, without

reservation of any right of defendant as lessee to the oil and gas. The claim by plaintiff was for the $50 per month rental from three months after the execution of the lease up to the commencement of the suit. The defendant alleged the true construction of the writing to be that the monthly rental was payable only from three months after the date of the lease until the expiration of six months, when, if there had been no entry for purposes of drilling, the contract was at an end, and all liability on its part ceased; but, if this were not the case, then under the forfeiture clause, all the rights of defendant in case of nonentry terminated at the expiration of six months, and with its termination all liability for rent ended. It was further averred that, in any event, the entry for building purposes in spring of 1887 was an eviction of the lessee as of that date, and terminated the right of the lessor to demand rent.

The case, on the law and facts, was submitted to the decision of the court, under the act of 1874. The court concluded on the facts, under the authority of *Leatherman* v. *Oliver,* 151 Pa. St. 649, 25 Atl. 309, and that line of cases, the clauses of forfeiture were for the benefit of the lessor, and that, under the evidence, he had not asserted his right until the conveyance of the lot to Porte; but that at that date he had, by his deed, in effect declared the lease at an end. Defendant having paid one month's rent, judgment was entered against him for the monthly rental from June 6, 1886, to February 6, 1889, the latter being the date of the Porte conveyance. From this defendant appeals, assigning for error the construction of the lease, and the refusal to hold that the entry for building purposes had not suspended liability for rent.

We decidedly concur with the learned judge of the court below in his construction of the two clauses of the lease relating to forfeiture. As he clearly shows, *Leatherman* v. *Oliver, supra, Jones* v. *Gas Co.,* 146 Pa. St. 207, 23 Atl. 386, *Phil-*

lips v. *Vandergrift,* 146 Pa. St. 357, 23 Atl. 347, *Ogden* v. *Hatry,* 145 Pa. St. 640, 23 Atl. 334, and other cases, effectually settle the law, by holding such clauses of forfeiture are for the benefit of the lessor, and, until he invokes them, the lessee's liability continues. At the argument it was not clear to us that the entry of the lessor for building purposes was not such an unequivocal act, indicating an intention to resume possession of the leased property, as terminated his right thereafter to demand rent. But, after full consideration, we are of opinion, under the evidence, that neither party so regarded the act at the time. The defendant had set its stake on the lot at the point where a well could be sunk in the future. The building was so located as not to interfere with development at this point. Now, if defendant had attempted to put down a well upon the lot within 20 years, could plaintiff have successfully maintained that the erection of a building covering only a few square feet had been an assertion of his right of forfeiture? We think, therefore, the court was right in its rulings on defendant's fourth and fifth points, and the assignment of error raising this question is overruled.

We also think the court was clearly right in holding the Porte conveyance a constructive eviction of defendant from the leased land. There was an absolute conveyance by the lessor of one of the lots; no reservation of the lessee's right of entry to drill for oil and gas. This clearly ended the liability of lessee for rent, and the court properly computed it only to that date.

All the assignments of error are overruled, and the *judgment is affirmed.*

THE ARGONAUT CONSOLIDATED MINING AND MILLING CO. ET AL. v. ROBERT TURNER ET AL.

(23 Colorado 400; 48 Pac. 685. Supreme Court. January 18, 1897.)

[1]**Patent carries surface and veins.** A patent to a mining claim carries with it the right to the surface territory described therein together with all lodes or veins having their tops or apices within such boundaries, except, perhaps, cross lodes.

Departure of vein immaterial, after patent. While in an adverse proceeding before a patent, the adverse claimant may, to defeat the entry, show that the vein relied on by his adversary departs from the side lines of the claim, he cannot for this reason invalidate a patent therefor after it has been issued.

Except as to extralateral rights. Where the course of a vein is across a mining claim as located upon the surface instead of lengthwise, the side lines of the location become the end lines, and end lines side lines, so far as lateral rights are concerned, but this does not impair the validity of a patent as to any part of the territory included therein.

Description in verdict. If judgment be for the plaintiff in an action of ejectment, the property should be described in the verdict or findings and judgment with such certainty as is reasonably available.

Proof of ouster. If the defendant in ejectment makes any defense other than a disclaimer, proof that he was in possession of the premises at the time of commencement of the action is unnecessary.

Appeal from the District Court of Clear Creek county.

This is an action for the possession of real property and damages for trespass thereon, instituted by Robert Turner and others, plaintiffs below, against The Argonaut Consolidated Mining and Milling Company and others, defendants. The complaint alleges that on January 1, 1892, plaintiffs were, and ever since have been, and now are, the owners in fee of a patented mining claim known as the Cecil lode mining claim, survey lot No. 428, Cascade mining district, Clear

[1] *Montana Co.* v. *Boston Co.* 19 M. R. —. Patent covers blind lodes. *Calhoun Co.* v. *Ajax Co.* 27 Colo. 1; *Affirmed*, 182 U. S. 499.

Creek county, Colorado, and of all other veins or lodes the top or apices of which lie within the surface boundaries of said Cecil claim. It is further alleged that on or before the 2d day of March, 1892, the defendants wrongfully entered upon said Cecil lode mining claim, and upon a lode or vein, the top or apex of which lies within the exterior boundaries of the Cecil claim, and ousted plaintiffs from the possession of the same, extracting ore therefrom to the damage of plaintiffs in the sum of $10,000.

The defendants, in their answer, deny all the allegations of the complaint, and for a second defense, The Argonaut Consolidated Mining and Milling Company alleges that it is the owner of the Argyros lode mining claim, and that the trespass complained of is not within the Cecil lode mining claim, but upon a vein the top or apex of which was within the surface boundaries of said Argyros lode mining claim; and that such vein extended throughout the entire length of the Argyros lode mining claim, and substantially parallel thereto, which vein, *in its downward course, dips under the Cecil mining claim,* into a claim to the north.

THIRD DEFENSE.

In a third defense it is alleged "that the vein upon which the location and discovery of the Cecil lode mining claim is based departs from the side lines of said Cecil lode mining claim within two hundred (200) feet from said discovery in a southwesterly direction, and does not enter into the same at any point to the southwest thereof; and that, by virtue of said departure from its strike of the apex of said vein from the side lines of said Cecil lode mining claim, the owners and locators of said Cecil lode mining claim lost and thereafter no longer had any right, title or interest whatever in or to the surface ground or any part or portion thereof embraced within the bounds and lines of said Cecil lode mining claim

to the southwest from the said point where the said vein upon its apex and strike departs from the side line of said Cecil lode mining claim; and that the said owners thereof might not lawfully or rightfully apply for a patent, or enter in or upon said portion of the Cecil lode mining claim, in which there is not found and does not exist the said vein upon which the discovery and location of said Cecil lode mining claim is based and made, and being that portion thereof in a southwesterly direction from the point where said vein upon its apex and strike departs from the side lines of said Cecil lode mining claim; and that, by virtue of the fact that the entry and patent alleged and set up in the said complaint was procured for a territory into which the said vein upon its strike and dip did not extend or penetrate, and that said territory was not subject under the laws of the United States governing and controlling in such cases to be entered or patented by the said locators and purchasers and owners of the Cecil lode mining claim; but that said part and portion of said claim so lying to the southwesterly direction from said point where said vein, as hereinbefore stated, departs from the side lines of said Cecil lode mining claim was territory not subject to be patented or entered, or title thereto procured by virtue of patent upon the Cecil lode mining claim, and that said patent, so far as it covers or includes such portion of the territory bounded by said claim, is wholly void, null and of no effect, and that no right, title or interest whatever in or to the same passed to, or could be, or is held by virtue of said patent or entry or the location of said Cecil lode mining claim."

Fourth and fifth defenses were interposed, neither of which is involved in this appeal. Thereafter plaintiffs filed a general replication to the new matters set up in the answer in the second, fourth and fifth defenses, and a general demurrer to the third defense, which demurrer was sustained. Afterwards, the case was tried to the court without a jury, upon

the evidence introduced by the plaintiffs, the defendants offering no evidence. The trial resulted in the following findings and judgment:

"The court having now heard all the testimony offered in the cause, and the same having been submitted to the consideration and judgment of the court without argument by counsel, and all and singular the premises being seen and now fully understood, the court finds the issue for the plaintiffs, and it doth further find that the plaintiffs are the owners of and entitled to the possession of Cecil lode mining claim, survey lot No. 428, situated in Cascade mining district, Clear Creek county, state of Colorado, and described by metes and bounds as follows, to wit:

"Beginning at Cor. No. 1, thence N. 53° 10′ E. 1,500 feet to Cor. No. 2, thence N. 36° 50′ W. 50 feet to Cor. No. 3, thence S. 53° 10′ W. 1,500 feet to Cor. No. 4, thence S. 36° 50′ E. 50 feet to Cor. No. 1, place of beginning.

"And the court doth further find that the apex of that certain lode or vein disclosed in the two certain shafts designated on the map introduced in evidence by plaintiffs as the Cecil and Price shafts, and in the levels running easterly from the Wallace shaft, east of the west end line of the Cecil patent survey lot No. 428, protracted downwards vertically, is and lies within the exterior boundary lines of the said Cecil lode survey lot No. 428, and that the plaintiffs are the owners of and entitled to possession of said lode or vein, though the same may, in its downward course, so far depart from a perpendicular as to extend outside the vertical side lines of said survey lot No. 428.

"Therefore, it is ordered, adjudged and decreed by the court, that the said plaintiffs, Robert Turner, John W. Ward, Daniel S. Kooken, Geo. E. McClelland, do have and recover possession of the said Cecil lode mining claim survey lot No. 428, as described in said findings, from the said defendants, The Argonaut Consolidated Mining and Milling Com-

pany, Marcus Finch, Charles Von Brandis, Frederick Walling, Armstrong Shepherd, Mike Weis, Wiley Morrill and Fred Burns, and that the plaintiffs do have a writ of possession therefor.

"It is further considered that plaintiffs do further recover their costs and charges by them in and about their suit expended, to be taxed, and that they have execution therefor."

To reverse this judgment, the cause is brought here by appeal.

MARCUS FINCH, ENOS MILES, CHAS. J. HUGHES and B. H. GILES, for appellants.

JACOB FILLIUS, for appellees.

CHIEF JUSTICE HAYT delivered the opinion of the court.

The third defense was interposed for the purpose of showing that the vein disclosed in the discovery shaft of the Cecil mining claim departed from the side lines of the claim as marked upon the surface, the contention in the court below being that for this reason the patent was absolutely void beyond the point of such departure. In support of this theory of the law the case of *Armstrong* v. *Lower,* 6 Colo. 399, and similar cases are cited, and the following language from the opinion in *Armstrong* v. *Lower* is particularly relied upon: "The vein is, of course, the principal thing, and the location should be made in conformity with the strike thereof. If the lode terminates at any point within the location, or departs at any point from the side lines, the location beyond such point is defeasible, if not void." But that was an adversary proceeding before patent, certified from the United States land office to the court for adjudication, in order that the rights of the parties might be determined, and patents issued accordingly; but the rule is otherwise after the pat-

ent has once been issued. The patent carries with it the right to the surface territory described therein, together with all lodes or veins having their tops or apices within such surface boundaries, except, perhaps, cross lodes. Hence, while an adverse claimant may, to prevent entry, show that the vein relied upon by his adversary departs from the side lines of the claim, he cannot for this reason invalidate a patent after the same has once been issued. The land department of the government is the tribunal selected for the determination of such controversies, subject to transfer to the courts under certain conditions, and a patent issued by the land department must be taken in an action at law as conclusive evidence of title in the patentee. *Smelting Co.* v. *Kemp,* 104 U. S. 636.

It is contended that appellants' third defense was filed in order that they might show that the vein upon which the trespass was committed was a vein the apex of which crossed one, if not both, of the side lines of the Cecil claim; but we find nothing in the pleading to warrant this contention of counsel. A reading of the defense will show that it was filed for another and different purpose, to wit, to question plaintiffs' patent title. Plaintiffs do not base their right to recover upon any claim that they were working upon the identical vein disclosed in the Cecil discovery shaft, this shaft being near the easterly end of the Cecil claim, the claim of the plaintiffs being that the defendants were trespassing upon a vein twelve hundred feet from that point, and near the westerly end of the Cecil claim.

The evidence shows beyond question that this vein enters the end line of the Cecil claim on the west, and extends for a considerable distance along the Cecil claim in a direction parallel, or nearly parallel, to the side lines. There is nothing to indicate that this vein in its strike departs from the ground covered by the Cecil patent, while all of the evidence shows that the apex of the vein is within the Cecil claim,

and hence, in its downward course or dip, it is included in the Cecil patent by the very terms of the patent and the statute under which it was issued. Section 2322, Revised Statutes of the United States.

We concede, as we must, that where the course of a vein is across the claim as located, upon the surface, instead of in the direction of its length, the side lines of the location become the end lines, and the end lines become the side lines, so far as lateral rights are concerned; but this does not invalidate the patent as to any part of the territory included therein. *King* v. *Amy M. Co.*, 152 U. S. 222; *Last Chance M. Co.* v. *Tyler M. Co.*, 157 U. S. 683. But no such question is properly involved in this case. The maps and oral evidence disclose that the vein in controversy has been worked for over 400 feet in a lateral direction by shafts, tunnels and drifts, and that this work discloses a well-defined vein, with a general course parallel, or nearly parallel, to the Cecil claim, as staked upon the surface, with its apex within the surface boundaries of that claim, after the vein leaves the Wallace claim, and enters the Cecil,—the Wallace being a mining claim abutting the Cecil on the west end.

The trespass complained of in this case was at a point north of the north side line of the Cecil claim, where the vein was carried in its downward course by reason of its dip, and the only contention is as to the apex of this vein. The particular place where the work was being done by the defendants seems not to have been in dispute in the court below. The record discloses that counsel then appearing for these appellants were sufficiently well-informed as to the place of the trespass to conduct a vigorous cross-examination in reference thereto.

It is also claimed that the findings and judgment are not sufficiently specific; that the territory trespassed upon must be described with the certainty which should, and usually does, mark the description given by a civil engineer. In

support of this contention, section 271 of the code is relied upon:

"The judgment in an action brought under this chapter shall be in accordance with the verdict, or if tried by the court, the judgment shall particularly specify the findings of the court, the same as the jury are, by this chapter, required to specify in their findings in the verdict, and if judgment be rendered for the plaintiff, it shall specify the amount of damages to be recovered."

We do not agree with counsel in their contention that it is necessary to describe the portion of the vein trespassed upon with mathematical certainty, although it may be advisable to do so where it is available, but such a description can only be obtained by an expert mining engineer, and the services of one sufficiently skilled may be beyond the resources of the ordinary miner. Hence, to require such a description would work a hardship in many cases, with no corresponding benefit. Moreover, if appellants wish the point of trespass defined with greater certainty, they should have called upon the trial court for greater minuteness of description. Not having done so, the right has been waived. The evidence shows where the trespass was committed, and it supports the finding that such trespass was upon a vein, the apex of which is within the Cecil claim as patented, and by reference to the maps introduced in evidence, the judgment can be made sufficiently certain for all practical purposes.

It is urged that the evidence does not disclose that the defendants, or either of them, were ever in possession of the property in dispute. This, however, is immaterial, as no disclaimer was filed, and under our code, when the defendant makes any other answer or defense, no proof of possession is necessary in the absence of a disclaimer. Code, Sec. 276.

Finding no error in the record, the judgment of the district court will be affirmed.

Affirmed.

[1]REPUBLICAN MINING CO. v. TYLER MINING CO.

(79 Federal 733. Circuit Court of Appeals, Ninth Circuit. February 1, 1897.)

Limit of review on second writ of error. Where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; and the appellate court is not bound to consider any of the questions which were before it on the first writ of error.

Right of lode leaving one side line. When a lode enters an end line of a regularly located mining claim, and runs in its course lengthwise, nearly parallel with the side lines of the claim for the greater part of the length of the claim, the owners of the claim are not deprived of the extralateral rights attached to it because the lode crosses a side line before reaching the other end line, but the extralateral rights will extend from the end at which the lode enters to the point at which it crosses the side line, whether a new end line is regarded as being drawn at that point or not.

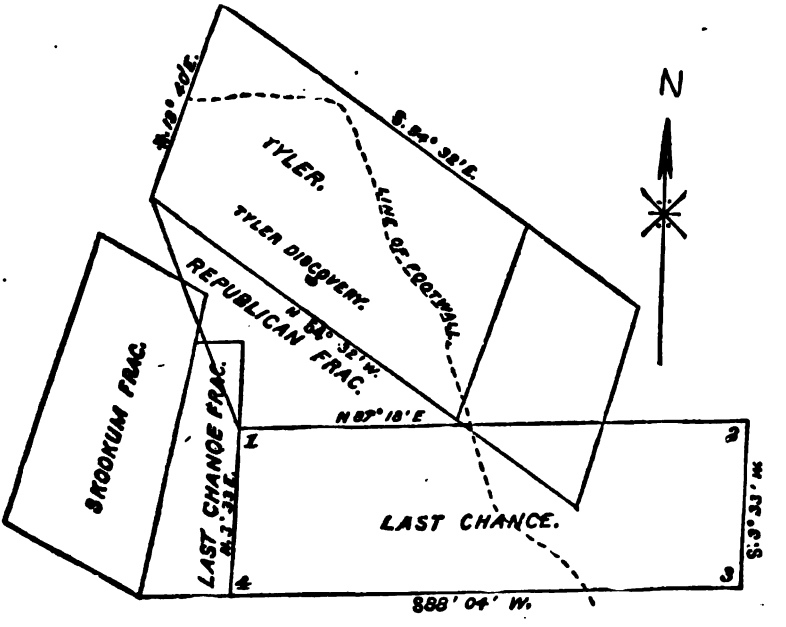
In Error to the Circuit Court of the United States for the District of Idaho.

This cause was tried before the circuit court, a jury having been waived by stipulation of the parties, as provided by section 649 of the Revised Statutes, upon an agreed statement of facts, which will be found in *Mining Co.* v. *Sweeney,* 79 Fed. 277, to which reference is here made. The portion which relates particularly to this case, and is not copied in that case, is as follows: "It is further agreed that the Republican Fraction mining claim was duly located on the 1st

[1]In *Tyler Co.* v. *Last Chance Co.* 18 M. R. 303, the apex involved in the text was of the same vein and between the same planes but different parties. The apex was not allowed to prevail because the Last Chance being a prior location had the right to follow down on the vein between the vertical planes. But the facts being different no such defense was available to the fractions involved in the text case.

day of November, 1885, and that the said location, so far as the making said discovery, marking said surface boundary, and recording such locations are concerned, was made in conformity with the law, and that the annual labor required by law has been duly perfomed therein; that the vein discovered in the said Republican Fraction mining claim is the same vein which passes out through the southerly side line of the Tyler claim. It is agreed that the vein on which the said Tyler, Last Chance, and Republican Fraction claims are located passes on its said dip underneath the surface limits of the Last Chance Fraction and Skookum Fraction claims, as they are laid down in said diagram." The diagram referred to in the statement of facts will be found in *Mining Co.* v. *Sweeney,* 79 Fed. 277.

The following diagram shows the relative position of the said claims upon which the lode is shown to pass, it being of the width of about 300 feet. It also shows the tunnels and works passing from the Tyler claim into the Republican



Fraction claim, and the stope from which the Tyler Mining Company has been, and now is, seeking to extract ore, within the lines of the Republican Fraction claim, and the dates of the respective locations.

W. B. HEYBURN, for plaintiff in error.

JOHN R. MCBRIDE, for defendant in error.

Before Gilbert and Ross, Circuit Judges, and Hawley, District Judge.

Hawley, District Judge (after stating the facts). It is claimed that the court erred, among other things, in finding, as a conclusion of law:

"That the plaintiff, the Tyler Mining Company, is entitled to judgment against the Idaho Mining Company and the Republican Mining Company for the possession of those certain premises described in the complaint and in the agreed statement of facts, to wit, that certain ledge or vein in place bearing valuable minerals, having its outcrop and apex within the limits of the Tyler mining claim, as described in said agreed statement of facts, with the right to follow, as against the Republican and Idaho Mining Companies, such ledge or vein upon its descent into the earth to any depth between the two perpendicular planes continued in their own direction past through the two end lines of the Tyler claim, as the same is now described in the patent issued by the United States for such claim, even though such vein shall extend outside the vertical side line of said Tyler mining claim, and under the Republican Fraction, the Last Chance Fraction, and the Skookum Fraction mining claims, claimed by said defendant the Republican and Idaho Mining Companies."

The conclusions of law upon the agreed statement of facts are in harmony with the decisions of this court, as will hereafter more clearly appear.

The contention of the plaintiff in error is that the defendant in error has no extralateral right to follow the lode or vein in the Tyler mining claim in its downward course beyond the southerly side line of the Tyler claim, for the reason

that, as is shown in the diagram, the lode or vein passes through the side line of the Tyler location. It is further contended that any rights which the defendant in error may have by virtue of its ownership of the Tyler claim must date from the establishment of "the intermediate end line first made on the ground after the commencement of this action."

Both of these questions have been decided by this court adversely to the contention of plaintiff in error. It is well settled by numerous decisions of the supreme court that where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; that the appellate court is not bound to consider any of the questions which were before the court on the first writ of error.

In *Roberts* v. *Cooper,* 20 How. 481, the court said:

"It has been settled by the decisions of this court that after a case has been brought here and decided, and a mandate issued to the court below, if a second writ of error is sued out, it brings up for revision nothing but the proceedings subsequent to the mandate. None of the questions which were before the court on the first writ of error can be reheard or examined upon the second. To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first would lead to endless litigation. In chancery a bill of review is sometimes allowed on petition to the court; but there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate on chances from changes in its members. See *Sizer* v. *Many,* 16 How. 98; *Corning* v. *Iron Co.,* 15 How. 466; *Rose* v. *Himeley,* 5 Cranch, 515; *Canter* v. *Insurance Co.,* 1 Pet. 511; *The Santa Maria,* 10 Wheat. 431; *Martin* v. *Hunter's Lessee,* 1 Wheat. 304; and *Sibbald* v. *U. S.,* 12 Pet. 488."

In *Mining Co.* v. *Sweeney,* 4 C. C. A. 329, 54 Fed. 284, and *Last Chance M. Co.* v. *Tyler M. Co.,* 9 C. C. A. 613, 61 Fed. 557, this court decided that where a lode enters an end line of a regularly located mining claim, and runs in its course lengthwise, nearly parallel with the side lines of the

claim for the greater part of the length of the claim, the owners of the claim are not deprived of the extralateral rights attached to the claim, under the provisions of section 2322, Rev. St., because the lode or vein crosses a side line before reaching the other end line; that the true construction of the statute is that, when the lode or vein crosses a side line before reaching the other end line, the owner's extralateral rights will extend from the end at which the lode enters to the point on the lode at which it crosses the side line. Numerous authorities were cited in support of these views. The following additional authorities sustain the principles therein announced: *Consolidated Wyoming G. M. Co.* v. *Champion M. Co.*, 63 Fed. 540, 546; *Del Monte M. & M. Co.* v. *New York & L. C. M. Co.*, 66 Fed. 212, 215.

In reply to the criticism of counsel with reference to the right to draw the intermediate end line at the point where the lode crosses the southerly side line of the Tyler, we quote the language of Judge Hallett in *Del Monte M. & M. Co.* v. *New York & L. C. M. Co., supra,* as follows:

"It is said that we cannot make a new end line at the point of divergence or elsewhere, because the court cannot make a new location, or in any way change that made by the parties. *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196; 6 Sup. Ct. 1177. This however is not necessary. We can keep within the end lines fixed by the locator in respect to any extralateral right that may be recognized without drawing any line, and if there be magic in the word 'line,' it will be better not to use it."

In *Last Chance M. Co.* v. *Tyler M. Co.*, 157 U. S. 683, 696, 15 Sup. Ct. 733, the court declined to consider this question, because, under the views expressed by the court upon another branch of the case, it was deemed unnecessary so to do.

There is no decided case to which our attention has been called in opposition to the views heretofore expressed by this court upon the questions involved in this case. The judgment of the circuit court is *affirmed, with costs.*

BENJAMIN C. CATRON v. ROBERT O. OLD ET AL.

(23 Colorado 433; 48 Pac. 687. Supreme Court. February 3, 1897.)

Apex leaving side line. When the strike of a vein is parallel with the side lines of the claim, the owner of the apex has the right to follow the vein downward in its dip to any depth, although in so doing he passes beyond the side lines of his claim as located upon the surface into adjoining territory, but it is otherwise when the strike of the vein is across the side lines.

[1]**Where the vein leaves the same side line twice,** the owner of such mining claim has no extralateral rights.

Appeal from the District Court of Clear Creek County.

This is an action for possession and damages to real property, instituted by Benjamin C. Catron, as plaintiff, against Robert O. Old and Ellen Old, defendants. The trial in the court below resulted in a verdict and judgment for the defendants. Plaintiff appeals.

A. D. BULLIS and MORRISON & DESOTO, for appellant.

E. H. PARK and JACOB FILLIUS, for appellee.

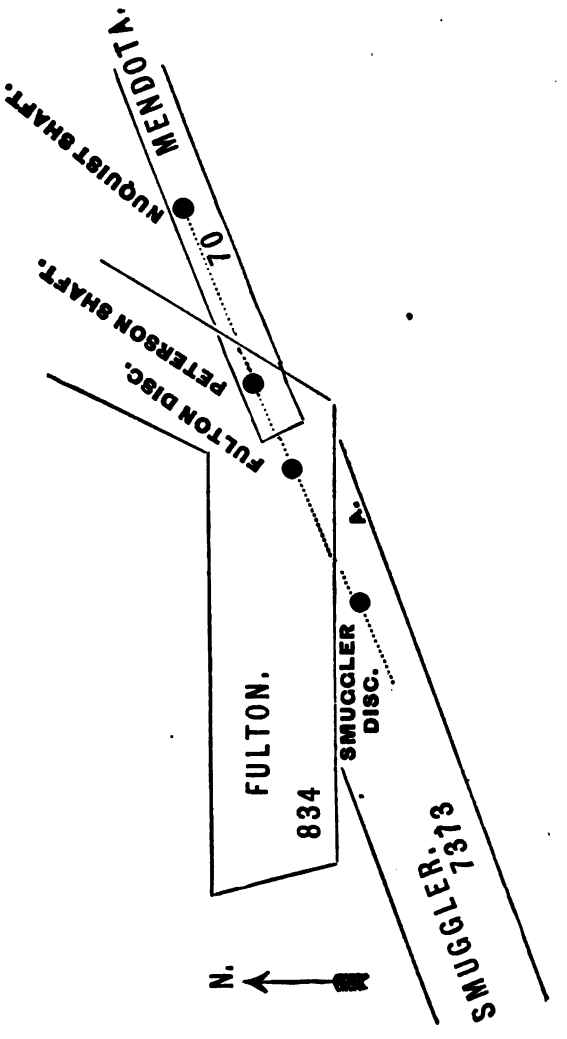
CHIEF JUSTICE HAYT delivered the opinion of the court.

Upon the facts which are conceded a single question of law is raised. The point in controversy may be clearly understood from the map and diagram on the next page. The plaintiff is the owner of the Smuggler mining claim, survey lot No. 7373. Defendants are the owners of the Fulton and

[1]In *St. Louis Co.* v. *Montana Co.* 104 Fed. 665, is a plat of a vein leaving the same side line twice, to which apex rights were allowed. But they were allowed solely on the ground that the discovery vein had apex rights and that this vein, which was a side vein, had the same rights as the discovery vein. See Lindley, 2nd Ed. § 584.

Mendota mining claims, survey lots No. 70 and 834. All the claims are patented, and there is no question of surface rights. The dotted line on the map shows the apex of the vein through the claims. This vein, which has been explored extensively in workings upon both the Mendota and Fulton claims, dips to the south beneath the surface of the Smuggler claim. In following the vein upon its dip, the defendants passed beyond the side line of the Fulton claim, and are working beneath the surface boundaries of the Smuggler claim at a point marked "A" upon the map.

The question presented is as to whether the vein at "A" belongs to the owners of the Fulton or to the plaintiff by reason of his ownership of the Smuggler claim. The plaintiff's right is based upon his ownership of the surface, upon the common law principle that the owner of the surface owns all above and all beneath. The defendants claim by reason of the apex of the vein being within their surface boundaries. It is claimed that the common law doctrine is changed by section 2322 of the Revised Statutes of the United States, which provides, *inter alia,* that the owners of the surface shall be entitled to all veins, lodes or ledges throughout their entire depth, where the top or apex of such vein lies within the surface lines of the claim extended vertically downward, although such veins, lodes or ledges may, in their downward course, so far depart from a perpendicular as to extend outside the side lines of such surface location, such lateral rights to be confined to such portions as lie between vertical planes drawn downward through the end lines of the location. The question is thus sharply defined: The plaintiff claims that, by reason of the strike of the vein in the Fulton location, the defendants have no extralateral rights whatever, while the defendants claim that they have such rights, and are, by reason thereof, entitled to the vein in its downward course, through the Smuggler territory.


MENDOTA.
NUQUIST SHAFT.
10
PETERSON SHAFT.
FULTON DISC.
A.
SMUGGLER DISC.
FULTON.
834
SMUGGLER.
7313
N.

Questions upon the law of the apex under the United States statutes are receiving much attention from mining communities and from the courts. At one time it was quite generally conceded that the owner of the apex might follow the vein upon its dip under all circumstances, but decisions of the supreme court of the United States in recent years have been contrary to such generally accepted doctrine.

In *Mining Co.* v. *Tarbet,* 98 U. S. 463, it was held that a location laid across a vein, so that its greatest length crosses the same instead of following the course, would secure only so much of the vein as it actually crosses at the surface. In speaking of the right to follow veins upon the dip, the court said, in reference to the intent of the statute:

"We think that the intent of both statutes is, that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; and that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law."

After this decision was rendered it was still thought that the owner of the apex had a right to follow the vein on its dip beyond the side lines, although the vein crossed both side lines, and although the end lines were to be treated as side lines, and the side lines as end lines. The question again came before the supreme court in the case of *Iron Silver M. Co.* v. *Elgin M. & S. Co. et al.,* 118 U. S. 196, which was

a contest between the owners of the "Stone claim," located in the shape of a horseshoe, and an adjoining claim, and it was held that as the end lines of the Stone claim as located upon the surface were not parallel, the owners had no extralateral rights and were not permitted to follow the lode in its downward course beyond the side lines of the claim.

The question next came before that court in the case of *Argentine M. Co.* v. *Terrible M. Co.,* 122 U. S. 478, where it was again held that when the claim upon the surface crosses the vein, instead of being along the same, as provided by statute, the end lines of the claim became the side lines, and the side lines became the end lines, and that the apex rights must be determined accordingly.

Notwithstanding the vein in its strike across the country passed across the side lines instead of running parallel with them, the opinion had become so firmly fixed that these decisions did not entirely overthrow it, but in the subsequent case of *King* v. *Amy & Silversmith M. Co.,* 152 U. S. 222, the langauge of the court left no ground for dispute. In that case it was first definitely and authoritatively determined that when a vein crossed both side lines of a claim, instead of running in a direction parallel thereto, the owner of the surface had no apex rights that would allow him to follow the vein in its dip beyond a vertical plane drawn downward from the surface boundaries of the claim.

This last decision was followed in the more recent case of *Last Chance M. Co.* v. *Tyler M. Co.,* 157 U. S. 683. Therefore, it may now be said that the rule is well established in cases other than horizontal veins, if the vein in its strike across the country is parallel to the side lines of a claim, the owner of the apex has the right to follow the vein to any depth in its dip beneath the surface, although in so doing he passes beyond the side lines of his claim into adjoining territory; and it is equally as well settled that when the strike of the vein is across the side lines of a claim, no extra-

territorial rights are acquired by reason of the owership of the apex. But there are other important questions of the law of the apex which have not at this writing been passed upon by the supreme court of the United States. In the case just cited it is said, as to one of such questions: "There has been no decision as to what extraterritorial rights exist if a vein enters at an end and passes out at a side line;" and, it may be added, that in no case has that court directly decided the question before us in the case at bar, where the vein upon its strike enters the claim by crossing one side line and leaves the claim at the same side.

It is claimed by appellant that the facts in this case are so nearly similar to the facts in the case of *King* v. *Amy & Silversmith M. Co., supra,* that the decision in that case against the right of the apex owner is controlling here. There is, however, a marked difference between the two cases, as will be seen by a comparison of the diagram in this case with the one to be found in the opinion in that case.

Perhaps the case at bar more closely resembles the claim set up by the owners of the Stone claim, and passed upon in the case of *Iron Silver M. Co.* v. *Elgin M. & S. Co., supra,* the Stone claim being located in the shape of a horseshoe, and the location in this case being similar, although the ends of the appellees' claim are at a greater distance apart, the claim being in the form of an obtuse angle. The latest expressions of the United States supreme court upon the subject seem to indicate that the location upon the surface must substantially cover the vein, although a somewhat different construction has been put upon these cases by some of the circuit courts of the United States, and by the circuit court of appeals of the ninth circuit. In the case of *Last Chance M. Co.* v. *The Tyler M. Co.,* 61 Fed. Rep. 557, the comparative direction of the vein was thought by the court to be controlling, and in that case it was said to be a question of fact

as to whether or not the vein extended more along than across the claim.

The doctrine of *Last Chance M. Co.* v. *Tyler M. Co.* was followed in the case of *Con. Wyoming M. Co.* v. *Champion M. Co.,* 63 Fed. Rep. 540, the opinion in both cases having been written by the same judge. In the latter case it is said:

"One general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be to preserve in all cases the essential right given by the statute to follow the lode upon its dip, as well as upon the strike, to so much thereof as its apex is found within the surface lines of the location. If the lode runs more nearly parallel with the end lines than with the side lines, as marked on the ground as such, then the end lines of the location must be considered by the courts as the side lines meant by the statute. If the lode runs more nearly parallel with the side lines than the end lines, then the end lines, as marked on the ground, are considered by the court as the end lines of the location. In both cases the extralateral rights are preserved and maintained, as defined in the statute."

In both cases the learned judge proceeds upon the doctrine of comparative direction of the lode, and it was left to the jury, as a question of fact, whether or not the vein extends more along than across the claim. The obvious objection to this doctrine is, that it introduces a feature of uncertainty into mining titles, which should be avoided, if possible. Moreover, it is in irreconcilable conflict with the decision of the supreme court of the United States in the *Amy & Silversmith Case, supra.* An examination of the plat accompanying and made a part of that decision shows that the court denied extralateral rights to a vein which, in fact, runs "more along than across" the location upon the surface.

In the case of *Montana Co.* v. *Clark,* 42 Fed. 626, it was

held that where a claim is in the form of an isosceles triangle, the owner cannot follow the lode or vein upon the dip through the side lines of the claim into another claim. This case followed the *Iron Silver M. Co.* v. *Elgin M. & S. Co. Case, supra,* and proceeded upon the theory that to the exercise of the right to follow the vein upon its dip, the end lines must be parallel.

With the exception of the *Wyoming-Champion Case,* these cases were all decided before the decision in the *Amy & Silversmith Case, supra,* was announced, which case, as we have stated, contains the first direct and positive declaration upon the subject by the supreme court of the United States. There has been one decision rendered upon the question since by the district judge of this district. In *Del Monte M. & M. Co.* v. *N. Y. and Last Chance M. Co.,* 66 Fed. 212, a question was presented as to apex rights between the New York claim and the Del Monte claim, the New York being higher up the mountain than the Del Monte, and holding the apex. Explorations had disclosed that the New York vein, in its general course, had within its side lines the apex for a distance of 1,070 feet. As the vein entered one end line of the New York claim, the only difficulty found by the district judge grew out of the fact that it departed from the side lines of the claim about 280 feet from the end line opposite the place of entrance, the claim being less than the full length allowed by statute. In these circumstances, upon a preliminary application, the learned district judge held that the owners of the New York were entitled by reason of their apex rights to follow the vein in its downward course through the side lines of the claim, and beneath the surface boundaries of the Del Monte location.

While there are some expressions in the opinion which would seem to be in favor of the contention of appellees in this case, if the facts are not considered, yet when it is remembered that the vein entered one end line of the New York

claim and extended more than 1,000 feet in a general direction parallel to the side lines of the claim, it would seem that the decision is hardly in point in this case.

In the recent case of *The Argonaut Con. M. Co.* v. *Turner*, 23 Colo. 400, this court held that where a vein passed through an end line of a claim and extended, as far as disclosed (this being for a considerable distance) in a general direction parallel to the side lines of the location, the lower court was justified in giving the claim extralateral rights, there being no evidence to show that the vein departed from the side lines of the location at any point, the presumption being that the vein continued regularly upon its course.

In the case at bar, no part of the Fulton vein runs parallel or nearly parallel with the side lines of that claim, as staked upon the surface. The United States supreme court has said that if the locator of a mining claim mistakes the direction of his vein, and locates accordingly, the courts have no power to make a new location for him, but must determine his rights with reference to the location actually made. *King* v. *Amy & Silversmith Co., supra.* Developments made subsequent to the location of the Fulton disclose that the claim as located contains very little of the apex of the vein, and such as it does contain does not cross either end line, and does not run parallel or nearly parallel to the side lines; so that, in no aspect of the law can the Fulton be allowed extralateral rights by reason of the apex of the vein. The judgment of the district court must accordingly be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

MEYDENBAUER v. STEVENS ET AL.

(78 Federal 787. Circuit Court, District of Alaska. February 13, 1897.)

Alaska. The mineral land laws of the United States were extended to Alaska by the organic act of that territory.

Dimensions and form of lode claim. Under the federal statute a lode claim cannot exceed 1,500 feet in length by 600 feet in width, and should be in the form of a parallelogram having its side lines equidistant from the center of the lode with end lines parallel to each other.

[1]**A lode is a zone, belt or body of quartz** or other rock lodged in the earth's crust and presenting two essential characteristics, viz: (1) It must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute.

The finding of such a belt, zone, or body is a discovery within the meaning of the statute, and will authorize the location of a lode claim.

Distinct marking the only statutory requirement. In locating a lode claim all that the statute requires is that the location shall be distinctly marked on the ground so that its boundaries can be readily traced.

Whether any markings have been made, and whether they are such that the boundaries of the location can be readily traced, are questions of fact.

Local rules not judicially noticed. Local rules and regulations of miners, although recognized by the statute, are not subjects of judicial notice, but must be presented with the evidence in the case.

[2]**Record of location.** The statute does not require any record of location, but when one is made it prescribes what the same shall contain, viz. the name of the locator, the date of location, and such a description of the claim by proper references as will identify the claim.

Purpose of record. The principal object of the record of the location is the identification of the claim; and if, considering everything it contains,—the name of the locator, the date of the location, and the description by reference to some natural object or permanent monument,—the claim can be identified, the record is sufficient.

---

[1] *Cons. Wyoming Co.* v. *Champion Co.* 18 M. R. 113. *Shoshone Co.* v. *Rutter*, 87 Fed. 801. *Book* v. *Justice Co.* 17 M. R. 617.

[2] *Poujade* v. *Ryan*, 21 Nev. 449; 33 Pac. 659. *Haws* v. *Victoria Co.* 160 U. S. 303.

No notice of location is required by the statute, but when the same is posted on the ground it may be considered as a marking to aid in tracing the boundaries of the location.

Record as notice. When a notice of location contains a description of the claim, and is recorded, it operates as constructive notice that the locator claims the ground described.

Description binding. The description of the location as shown by the record ordinarily will bind the locator as to the locus of the claim.

[3]**Monuments control distances and courses.** But where the distances and courses set out in the description as recorded vary from the monuments or markings made on the ground, the latter prevail, and will determine the locus of the claim.

Title of the United States. Rev. St. U. S. § 910. By this section no possessory action shall be affected by the paramount title of the United States, but each case must be adjudged by the law of possession.

Prior location. The effect of a valid location is to segregate from the public lands the ground located, and the prior location gives the prior and better right.

A valid location vests in the locator the exclusive right of possession and enjoyment of the ground located, together with all lodes therein.

[4]**Ejectment—Mere intruder.** The maxim that the plaintiff must recover on the strength of his own title does not apply in the case of a naked trespasser or intruder, although the party in possession may have a defective location. In such case the latter's possession alone is sufficient to maintain ejectment.

---

[3]*Stinchfield* v. *Gillis*, 18 M. R. 195.

[4]Ejectment lies on possession alone against a mere intruder. *Campbell* v. *Silver Bow Co.* 49 Fed. 47. *Sears* v. *Taylor*, 5 M. R. 318.

A miner locating a claim without discovery can hold possession of the surface as against one showing no better right. *Field* v. *Grey*, (Ariz.) 25 Pac. 793.

In action concerning possessory mining claims rule of plaintiff recovering on the strength of his own title does not prevail. *Strepey* v. *Stark*, 17 M. R. 28.

In suit by owner of placer patent against party in possession of lode known to exist before issue of the patent, the rule applies that plaintiff must recover on the strength of his own title. *Reynolds* v. *Iron Silver Co.* 15 M. R. 591.

An equitable defense may be plead to the action of ejectment. *South End Co.* v. *Tinney*, 22 Nev. 19; 35 Pac. 89. The facts constituting such equitable defense must be stated. *Brady* v. *Husby*, 21 Nev. 453; 33 Pac. 801. Equitable title not pleadable in the action in the Federal Courts. *Highland Boy Co.* v. *Strickley*, 116 Fed. 852.

This was an action in ejectment to recover a portion of a lode mining claim.

BURTON E. BENNETT, for plaintiff.

H. STEVENS, for defendants.

DELANEY, District Judge (charging jury). This is an action commonly known in the law as "ejectment." The plaintiff brings the action for the purpose of recovering possession of a certain piece or parcel of land which he claims, and which is a part of a lode mining claim. He has introduced testimony that defendants have ousted him therefrom, and asks judgment restoring the ground to himself. It is the contention of the defendants that they are not on the plaintiffs land; but that the ground, when they took possession of it, was open and unoccupied public land, and that as such

Ejectment lies for the right to mine. *Reynolds* v. *Cook*, 83 Va. 817; 3 S. E. 710; 5 Am. St. R. 317. *Barker* v. *Dale*, 8 M. R. 597.

When defendant pleads specially (and only) a right to mine, and proves it, a general verdict for plaintiff is bad. *Reynolds* v. *Cook*, *supra*.

Ejectment lies for a ditch. It is not an incorporeal hereditament. *Integral Co.* v. *Altoona Co.* 75 Fed. 379.

Notifying a party not to work amounts to an ouster. *Bramlett* v. *Flick*, 23 Mont. 95; 57 Pac. 869.

Will not lie as to ground on which party has covenanted not to sink. *Indianapolis Co.* v. *Kibbey*, 17 M. R. 677.

Occasional digging of sand does not amount to an ouster. *Parker* v. *Wallis*, 60 Md. 15; 45 Am. Rep. 703.

In suit supporting adverse claim each party must prove his own title and cannot rely on the weakness of his adversary. *Murray Hill Co.* v. *Havenor*, 24 Utah 73; 66 Pac. 762. *Schultz* v. *Allyn*, 18 M. R. 649.

In an ordinary ejectment suit, not supporting adverse claim, the complaint need not allege citizenship. *Harris* v. *Kellogg*, 117 Cal. 484; 49 Pac. 708.

Where defendant sets up an affirmative title it is in effect only a denial of plaintiff's title and needs no reply. *Iba* v. *Central Ass'n.* 5 Wyo. 355; 40 Pac. 527; 42 Pac. 20.

Where prior locator sues later locator, the later locator must plead

they had the right to take possession. Both parties claim possessory rights under the rules of law governing what are termed "mining claims." One of these claims is known as the "P. I." title to which is asserted by the plaintiff, and which, as he contends, is overlapped by two claims owned, as they contend, by the defendants, which claims are known as the "Golden Eagle" and the "Sky Pilot." A proper determination of the differences between these parties necessarily leads us to an investigation of the mining laws relating to the mineral lands of Alaska.

On the 10th day of May, 1872, congress passed an act opening all lands containing mineral deposits, belonging to the United States, to location, occupation, and purchase by citizens of the United States, and those who have declared their intentions to become such. By the act of May 17, 1884 (23 Stat. 24, Supp. Rev. St. p. 433), whereby a civil gov-

a forfeiture by the prior locator to let in his own title. *Bishop* v. *Baisley*, 28 Oreg. 119; 41 Pac. 936.

Requisites of complaint in such case stated. *Power* v. *Sla*, 24 Mont. 243; 61 Pac. 468.

Defendant may show plaintiff's discovery was upon land not subject to location, having been taken up by patent to third party. *Girard* v. *Carson*, 18 M. R. 346.

Where defendant claims only part of tract sued for he must show what part. *Croesus Co.* v. *Colo. Land Co.* 19 Fed. 78.

Where there is an issue denying some of the material facts it is error to dismiss without allowing jury trial. *Friend* v. *Oggshaw*, 3 Wyo. 59; 31 Pac. 1047.

Title necessary to maintain by parties holding under special contract of or for conveyance. *Moore* v. *Brown*, 16 N. Y. Sup. 592.

Lessee cannot maintain unless he has had possession and has opened mines. *Petroleum Co.* v. *Coal Co.* 89 Tenn. 381; 18 S. W. 65.

The Colorado Act taking away the right to second trial on payment of costs, operates on cases pending which had not already gone to their first trial. *Campbell* v. *Iron S. Co.* 83 Fed. 643.

Prohibition issued to prevent statutory new trial wrongly allowed by lower court. *Peo.* v. *Dist. Court*, 28 Colo. 161; 63 Pac. 321.

Recovery by plaintiff with allowance to defendant for improvements on a mine. *Bacon* v. *Thornton*, 16 Utah 138; 51 Pac. 153.

ernment was established for Alaska, commonly known here as the "Organic Act," the provisions of the mineral laws of the United States were extended to Alaska. Consequently the acts of congress, relating to the location and possession of mining claims, are the law of this territory on that subject. The act of 1872 (Rev. St. U. S. § 2319) is in part as follows:

"All valuable mineral deposits in lands belonging to the United States, both surveyed and un-surveyed, are hereby declared to be free and open to exploration and purchase by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs and rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

"Sec. 2320. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May, 1872, whether located by one or more persons, may equal but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface. * * * The end-lines of each claim shall be parallel to each other."

"Sec. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. * * *"

This statute may be properly explained to you, as it is the province of the court to interpret and expound the law, while it is your duty to decide the questions of fact. It is evident

from the language of the statute that this act contemplates that the claim shall be in the form of a parallelogram, having its side lines equidistant, and not exceeding 300 feet, from the center of the lode as it outcrops on the surface; and not exceeding 1,500 feet in length, and with the end lines parallel to each other. A claim of these dimensions and having this form will meet the requirements of the statute. In regard to the term "lode" or "vein," I may say that these words have been given a great many definitions by the courts; but perhaps among them all there is none entitled to greater weight than the one given by Mr. Justice Field, of the supreme court of the United States, who, in consequence of his long experience and eminent services on the bench, now covering a period of over 40 years, including his service in the courts of California and the supreme court of the United States, is considered by both bench and bar a very high authority. In *Eureka Con. M. Co.* v. *Richmond M. Co.*, 4 Sawy. 302, Fed. Cas. No. 4,548, Judge Field, in delivering the opinion of the court, discussed the question as to what constituted a lode at great length, and came to the conclusion:

"That the term as used in the acts of Congress, is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. It includes * * * all deposits of mineral matter found through a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes."

This definition has been approved and followed in a large number of cases. The supreme court of the United States, in *Mining Co.* v. *Cheesman*, 116 U. S. 536, 6 Sup. Ct. 484, after citing this definition with approval, also defines a lode as follows:

"A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode. * * * With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode."

In addition to these definitions, I will direct your attention to two characteristics mentioned in the statute, which are essential to and inherent in the formation of a lode. You will observe that the statute uses the language "quartz or other rock in place." By the phrase "in place" congress evidently intended to make a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of quartz or rock simply lying or resting upon the earth's surface without any walls, and also pieces or bowlders detached from the earth's crust, commonly called "float," and usually found in the mountain gulches and along the beds of streams in a mineral country. The quartz or rock designated as "in place" must be suspended between, or lie within, or be inclosed by walls of rock constituting the general mass of the earth's crust in the immediate vicinity of the zone or belt. "The zone may be very thin, and it may be many feet in thickness, or thin in places,—almost or quite 'pinching out,' as miners term it,—and in other places widening out into extensive bodies of ore." Uniformity of structure in the formation of the zone is not required, as it may narrow down until very thin, and then suddenly expand or swell out, and as suddenly contract, forming what miners sometimes call "kidneys;" but if it be held in place as I have described, and continuous in its formation between the country rock, it possesses one of the characteristics necessary to constitute a lode. The other necessary characteristic is that the belt or zone must bear some of the minerals or valuable deposits mentioned in this statute. A body of quartz or other rock in place might have the most clearly-defined walls, be of very great width, continue in its strike for a long distance, and go down to very great depth through the earth's crust, but, if totally barren of minerals, it would not be a lode. It is not necessary, however, that the minerals or valuable deposits shall be evenly distributed throughout the zone or belt. It may carry pay streaks near

either side or in the center of the lode. In places the zone may be nearly barren of mineral, and in others disclose pockets immensely rich in the precious metals. Areas of the lode may carry ore of a very low grade, while others contain bands or shoots heavily impregnated with mineral. It is sufficient if the zone or belt, as a whole, bears any of the valuable deposits mentioned in the statute. Whenever the two conditions I have mentioned are found together,—that is, (1) quartz or rock held in place by the adjacent country rock, and (2) the presence therein of gold, silver, cinnabar, lead, tin, copper, or other valuable deposits,—there is a lode. The finding upon the public lands of the United States of such a belt or zone as I have described is a discovery, within the meaning of this statute, and will authorize the location of a lode claim.

Your attention is now invited to the language of the statute concerning the location, which is as follows: "The location must be distinctly marked on the ground so that its boundaries can be readily traced." This is all the statute requires. The law does not state how the markings shall be made, the kind of markings, or in what particular place or places on the claim they shall be made. Stakes or posts, or piles of stone and bowlders, are markings; blazing trees along the boundaries of the claim, or at the corners thereof, is a marking; cutting away undergrowth, or making a trail through the timber along the sides or ends of the claim, putting up a stake at the point of discovery, blazing stumps, or posting a notice on the ground, placing such notice in a tin can and attaching it to a stake, fastening such notice to a tree, or placing it in a box or frame,—such as has been offered in evidence here,—are all markings. I may say here that we are trying this case exclusively within the laws of the United States, and, while the local rules and regulations of miners are recognized by the statute, on the trial of causes in court, unless they are produced and admitted in evidence, they

cannot be considered. In other words, courts do not take judicial notice of the local rules and regulations of mining districts or camps, and therefore in this case we are only to consider the provisions of the federal statute, as no local rules are before the court.

In considering the question of location, the court cautions you not to confound the location with the record of location, as has sometimes been done in the courts. The statute does not require any record of a location; but when a record is made the law provides that it shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. As the records of the conflicting claims in this case have been introduced in evidence, it is proper for me to instruct you upon the subject of records of mining claims. The substance of the statute upon this subject is that the record must contain (1) the name of the locator; (2) the date of the location; (3) a description of the claim, and such description must refer to some natural object or permanent monument such as will identify the claim. A mountain, a hill, a ridge, or hog's back, a butte, a cañon, a gulch, a ravine, a stream, a waterfall, a cascade, a lake, an inlet, bay, or arm of the sea, is a natural object; and stakes, posts, monuments of stones or bowlders, shafts, drifts, tunnels, open cuts, and well-known adjoining claims, especially if patented, are all permanent monuments. The chief purpose of the record is to identify the claim, and a reference in the record of the location of a mining claim to any natural objects or permanent monuments, like those I have enumerated, is sufficient, if such reference will identify the claim. Regarding notices of location, you are instructed that the law does not require that such a notice shall be either posted on the ground or recorded. Such a notice, however, is one kind

of a marking when posted on the ground; and, when containing a description of the ground located, and placed upon the record, becomes constructive notice to the world that the locator claims the ground described in the record. The description of the location as appears from the record is also binding on the locator with this exception: If the calls as to distances and courses set out in the description vary from the markings actually made on the ground, the latter are to prevail; as it is the markings on the ground which establish the boundaries of the claim in contemplation of the statute. To illustrate: If the miner, in describing his claim in his notice as recorded, should call for 1,500 feet E. S. E., and it should subsequently appear from posts or monuments or other markings on the ground that the distance was 1,400 feet, and the course S. E., the monuments or markings would control the location of the claim as against the description in the notice and record. Therefore, while you have the right to take into consideration notices of location actually posted on the ground as being one kind of a marking, and have also, for the purpose of identifying the claims or either of them, the right to consider the record of such notices, and the descriptions therein set forth, still, if you are satisfied from the evidence that the distances and courses set out in the description, as shown by the record, do not correspond with the markings made on the ground, then the latter must prevail, and will determine the locus in quo of the location, regardless of any description appearing from the record. The controlling act in making the location is the marking on the ground so that the boundaries of the location can be readily traced.

You will also understand, gentlemen, that the rules of law I give you apply to both sides of this case,—to the claim known as the "P. I." as well as to the conflicting claims known as the "Golden Eagle" and the "Sky Pilot." What has been done as to locating these claims and recording the locations

thereof, and whether there is a vein or lode within their respective boundaries, are questions of fact for you to determine from the evidence, under the definitions and instructions I have given you. Having disposed of these questions, it will become necessary for you to determine another question of fact, and apply to that question another rule of law to which I will now call your attention.

Section 910, Rev. St. U. S., provides that no possessory action between parties in any court of the United States for the recovery of any mining title, or for damages to any such title shall be affected by the fact that the paramount title to the land in which such mines lie is in the United States; but each case shall be adjudged by the law of possession. The cause now on trial is a possessory action, within the purview of this statute. The effect of the statute is to leave the United States entirely out of consideration in actions of this kind. The position of the government is one of neutrality, and neither party can take advantage of the paramount title of the United States, either to sustain his own title or defeat that of his adversary. The law of possession mentioned in this section is that the prior location and occupation carry with them the prior and better right. The effect of a valid location of a mining claim within the instructions I have given you is to segregate or cut out the ground located from the public lands; and until the locator either abandons his claim, or forfeits it by nonperformance of the annual assessment work, the same ground cannot be located or possessed by another person. The statute (section 2322) provides that the locator shall have the exclusive right of possession and enjoyment of all the surface ground included within the lines of his location, as well as of all veins, lodes, and ledges properly belonging to the claim; hence he who holds the prior valid location is entitled to the ground comprising his claim against all the world, excepting only the United States. Therefore,

gentlemen, if you find from the evidence that the plaintiff, after discovering such a lode or vein as I have defined to you, did, on or about the 26th day of September, 1895, and prior to any location or possession of the defendants, and, finding the ground unoccupied and unpossessed public land, make a location, in accordance with the rules of law I have given you, of the lode claim known as the "P. I.," then he is entitled to hold his claim, and to recover the ground in dispute. On the other hand, if you find from the evidence that the defendants, on or about the 21st day of September, 1896, made a valid location, according to the instructions I have given you, of the claims the "Golden Eagle" and the "Sky Pilot," and that the ground so located had not been previously located and possessed by plaintiff, but was open and unoccupied public land, then the defendants are entitled to hold their two claims, including the ground in dispute.

Counsel for the plaintiff has requested me to give you another proposition of law with reference to possessory rights of mining claimants, and I will give it to you in substance as he has submitted it. When a person in actual and bona fide possession of a piece of government land is ousted or ejected therefrom by one who, without any color of right or title, and acting as a naked intruder or trespasser, enters thereon, and ejects the first occupant, the latter has the right to recover possession, regardless of any defects in his title. If you find from the evidence that the plaintiff was in the actual possession of the ground in dispute, and that the defendants, without color of right or title but as mere intruders or trespassers, ousted the plaintiff therefrom, the latter is entitled to your verdict, although his location may have been defective. If, however, the land was unoccupied public land, the defendants had the right to enter and take possession. The theory of the rule is that the wrongdoer cannot attack the title of his adversary, and thereby sustain his own wrongdoing. This

doctrine is laid down by the supreme court of the United States in a very recent case (*Haws* v. *Mining Co.*, 160 U. S. 316, 317, 16 Sup. Ct. 287, 288) in the following language:

"The elementary rule is that one must recover on the strength of his own, and not on the weakness of the title of his adversary; but this principle is subject to the qualification that possession alone is adequate as against a mere intruder or trespasser without even color of title, and especially so against one who has taken possession by force and violence. This exception is based upon the most obvious conception of justice and good conscience. It proceeds upon the theory that a mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of one against whom the wrong has been by him committed."

The court also cites the case of *Christy* v. *Scott*, 14 How. 282, 292, wherein the court said:

"A mere intruder cannot enter on a person actually seized, and eject him, and then question his title, or set up an outstanding title in another. The maxim that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But, if the plaintiff has actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title."

You will, however, keep in mind the evidence necessary to justify the application of this rule. If you find from the evidence that the plaintiff was in the actual possession of the ground in dispute, with or without a valid location, and that the defendants, without color of right or title, acting as naked intruders or trespassers, ousted and ejected the plaintiff from the ground in controversy, then the rule of law I have just given you, as enunciated by the supreme court, will govern the case. But, if you do not find from the evidence these facts, the rights of the parties herein must be determined by the rules of law I have given you concerning the location and possession of the ground as mining claims.

The court does not desire to review the testimony, as I doubt not you will remember all its salient points, and you are the exclusive judges of the evidence. I will remind you, however, that the only locations in controversy here are the "P. I.," as claimed by the plaintiff, and the "Golden Eagle" and "Sky Pilot," as claimed by the defendants. I have admitted some testimony concerning the location of the "Alameda" and the old "Bear Mountain" lode claims. This was done for the reason that there is some evidence tending to show that the "Alameda" was located before either the "P. I." or the "Golden Eagle" or the "Sky Pilot," and that it adjoins the "P. I." endwise; and there is also some testimony tending to show that the "Alameda" is a relocation of the ground covered by the old "Bear Mountain" claim. The evidence concerning the two claims last mentioned was admitted to aid you in determining the exact ground covered by the other claims, and you will not consider it for any other purpose.

Verdict for the plaintiff.

GOLDEN REWARD MINING CO. v. BUXTON MINING CO.

(79 Federal 868. Circuit Court, District of South Dakota. W. D. March 13, 1897.)

[1]**Failure to adverse equivalent to judgment.** A decision of the land office awarding a patent for a mining claim after due publication of notice is conclusive upon an adverse claimant who has failed to file his claim, except for reasons which a court of equity might allow to be urged against a judgment at law.

Action of land office as to overlap. The question as to the true boundary of a mining claim for which a patent is asked is a question of fact, coming properly within the jurisdiction of the land department; and its action therein is conclusive, in the absence of fraud.

Corporation bound by acts of its officers. Same person agent for two companies. Where there was a conflict in the boundaries of the patents for two mining claims issued to separate corporations, the corporation to which the later patent was issued, having failed to adverse the claim of the other company, cannot claim relief in equity, upon the ground of mistake in the boundary, although the person whom it employed to take all necessary proceedings to obtain its patent was also the agent of the other company, it being charged with the knowledge of its agent as to the conflict.

Effect of disclaimer of area. Where a corporation, in applying for a patent for a mining claim, made a distinct disclaimer of a specific quantity of land, as being in conflict with a prior patent, it cannot claim relief in equity as to the conflict.

Negligence of corporate agent. As a corporation acts only through its officers and agents, it may be divested of its property by the negligence of its agents in failing to adverse an application for a patent for a mining claim.

G. C. MOODY, WM. R. STEELE and W. L. MCLAUGHLIN, for complainant.

[1]420 *M. Co.* v. *Bullion Co.* 11 M. R. 609.

Failure to adverse is a concession of priority to the other claim, as to date of location and as to both surface and extralateral rights. *Bunker Hill Co.* v. *Empire Co.* 109 Fed. 538.

Failure by senior location to file adverse waives priority in title to the junior location. *Whitman* v. *Haltenhoff*, 19 L. D. 245. *Lavagnino* v. *Uhlig*, (Utah) 71 Pac. 1046.

MARTIN & MASON and GRANVILLE G. BENNETT, for defendant.

CARLAND, District Judge. The complainant, a citizen of the state of South Dakota, filed its bill against the defendant, a citizen of the state of Iowa, for the purpose of having the title to a portion of the Bonanza mining claim, situated in the Whitewood mining district, Lawrence county, S. D., declared and decreed to be held in trust by said defendant for the use and benefit of the complainant. The bill also prayed for an injunction against the prosecution of an action at law now pending in this court, brought by the defendant against the complainant, to recover the sum of $220,000, alleged to be the value of certain ore taken by complainant from that portion of the Bonanza mining claim in dispute in the present action. The amount of mineral land in dispute, as shown by the testimony, is 1.34 acres. A demurrer to the bill was interposed, and, after argument, was overruled. The ruling, however, on the demurrer is immaterial, as the case made by the bill is not the case made by the evidence. The cause has been submitted on pleadings and proofs, and, after a careful examination of a voluminous record, I have arrived at certain conclusions, hereinafter stated. If the disposition of this cause depended upon a finding that the original southeast corner of the Bonanza mining claim was, at the time said claim was surveyed for patent, swung onto the Silver Case mining claim to the extent claimed by witnesses for complainant, I should not be able to find from the evidence that such was the fact, as the evidence is in sharp conflict, and is not of that clear and convincing character that is necessary to impeach a document of such solemnity as a patent from the United States.

As one of the positions taken by the complainant at the hearing is based on the idea that the southeast patent corner of the Bonanza is at the place where the same was originally

located, I prefer to base my decision on certain principles of law which, in my opinion, are fatal to the right of the complainant to the relief prayed for in its bill; and I shall therefore concede, for the purposes of this opinion, that, at the time of the official survey of the Bonanza for patent, the southeast corner stake was, by mistake, moved onto the Silver Case to the extent claimed by complainant. With this concession in the case, a fair preponderance of the evidence shows the following state of facts:

On the 31st day of March, 1888, the defendant, the Buxton Mining Company, filed in the United States land office, at Deadwood, Dakota territory, an application for a patent for the Bonanza mining claim, which application contained a correct description of said claim according to courses and distances. Upon the filing of said application, the usual order was made for the posting and publishing of the notice of said application, and the usual notice was posted on the claim, at the land office, and also was published in a newspaper for the period required by law and the rules and regulations of the general land office. No adverse claim having been filed within the period of 60 days, such proceedings were thereafter had that on the 12th day of March, 1891, a patent was issued by the United States to the defendant, the Buxton Mining Company, for the Bonanza mining claim. On the 11th day of August, 1888, the complainant, the Golden Reward Mining Company, filed an application in the United States land office at Deadwood, Dakota territory, for a patent from the United States for the Silver Case mining claim. This application contained a description of the claim by courses and distances, and the description concluded with these words: "Containing 8.76 acres, after deducting 1.50 acres, in conflict with Bonanza lode lot 516, and not claimed by this claimant." Notice of said application, containing the description of the Silver Case, as set forth in the application for patent, was posted

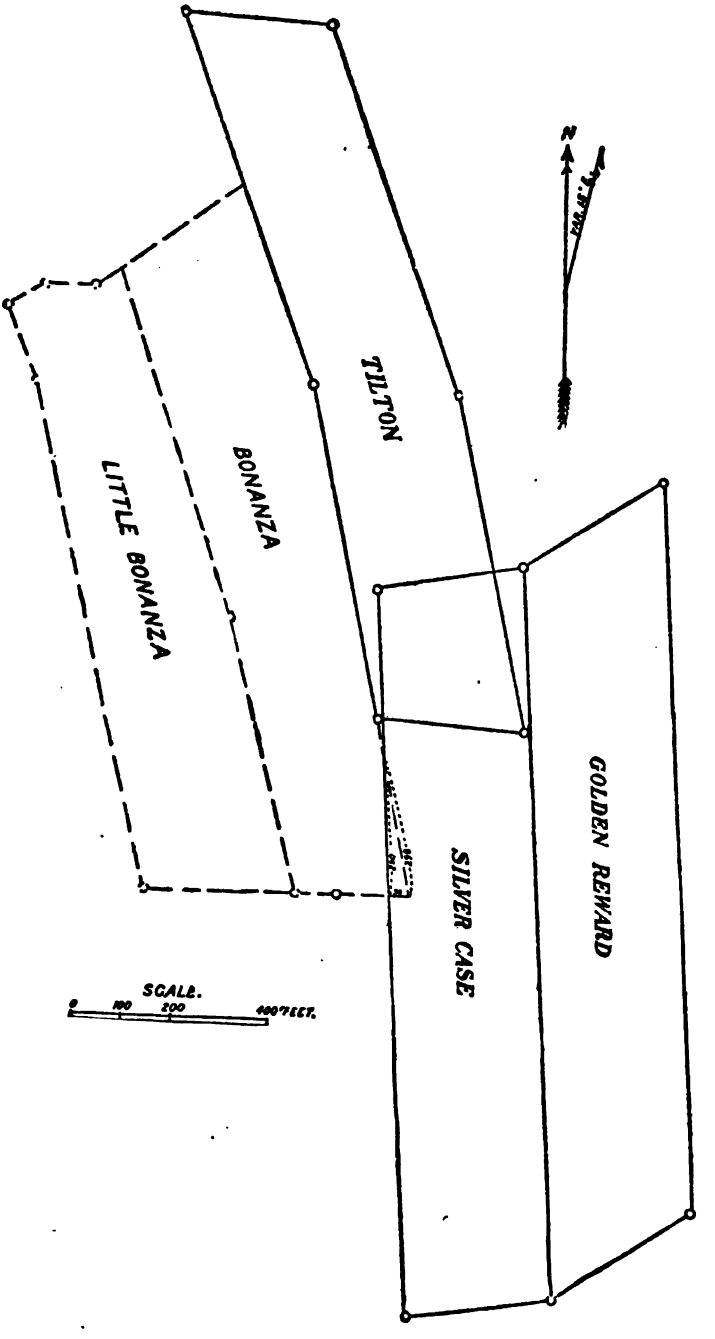
and published as required by law; and, no adverse claim being filed, such proceedings were thereafter had as resulted in the issuance of a patent by the United States to the complainant, for the Silver Case, March 17, 1892. It will now be observed that, so far as the record of the proceedings which resulted in the issuance of the patents for the Bonanza and Silver Case are concerned, they show that each applicant received a patent for just what it applied for, and that there were no adverse claims.

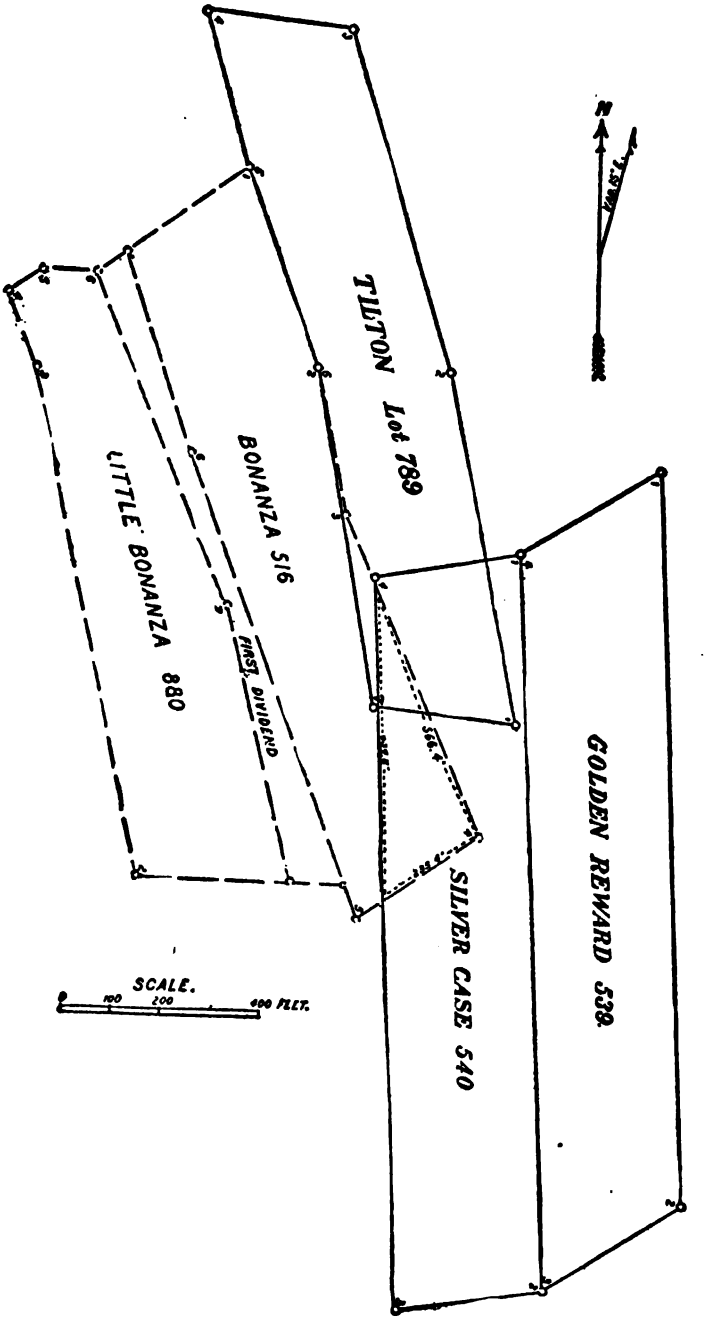
The proofs show that the Bonanza was first located, and its original location, with reference to adjoining claims, as claimed by complainant, is represented by the following diagram: (p. 596.)

Its location as patented, with reference to adjoining claims, is shown by the following diagram: (p. 597.)

It thus appears, and it is conceded, that there always was a conflict between the Bonanza and Silver Case; the contention of the complainant being that, at the time the Bonanza was surveyed for patent, the original southeast corner of the Bonanza was swung onto the Silver Case to such an extent as to change what was formerly a conflict of 15-100 of an acre to 1 34-100 of an acre. It appears also that the defendant Buxton Mining Company was the owner of the Little Bonanza mining claim, which is shown by Exhibit A to lie along the westerly side of the Bonanza, and by Exhibit B to lie along the westerly side of the Little Dividend.

Complainant claims that the swinging of the Bonanza onto the Silver Case not only allowed the defendant to obtain a portion of the Silver Case, but also allowed it to locate and patent the First Dividend. On the other hand, the defendant claims that, when it surveyed the Bonanza for patent, it was found that the claim was too wide at its southerly end line by 100 feet, so that, in order that the claim might conform to the limitations prescribed by law, it was necessary to draw in the


N
TILTON
BONANZA
LITTLE BONANZA
SILVER CASE
GOLDEN REWARD
SCALE.
0 100 200 400 FEET.


TILTON Lot 789
BONANZA 516
LITTLE BONANZA 880
FIRST DIVIDEND
SILVER CASE 540
GOLDEN REWARD 538
SCALE.
100 200 400 FEET.

west side line of the Bonanza, thus creating a space between the Bonanza and Little Bonanza, which defendant located and patented as the First Dividend. The official surveys upon which the applications were based, to obtain patents for the Bonanza and Silver Case, were made by Peter L. Rogers, United States deputy mineral surveyor. The official survey of the Bonanza was completed December 10, 1887, and of the Silver Case April 21, 1888. In November, 1887, the defendant employed one Thomas H. White to superintend and take all necessary proceedings to obtain a patent for the Bonanza. In January, 1888, the complainant employed the same Thomas H. White to superintend and take all necessary proceedings to obtain a patent for the Silver Case. Both of these employments were accepted by said Thomas H. White, and, under his supervision, patents were obtained for said mining claims, as hereinbefore stated.

It is the theory of the bill filed by complainant that the deputy mineral surveyor, Peter L. Rogers, was a mere agent of White, and that Rogers did whatever White requested him to do; that White, while he was, to the knowledge of defendant, the agent of the complainant, to obtain a patent for the Silver Case, was corrupted by the defendant to swing the Bonanza onto the Silver Case in making the official survey. These allegations of the bill are not only not proven by the evidence, but are disproven. The testimony fairly shows that Peter L. Rogers made the official surveys of both mining claims, and that the official survey of the Bonanza was completed before White was employed by complainant to obtain a patent for the Silver Case. There is no evidence upon which to base any finding that the defendant knew anything about the fact that White had been employed by complainant to obtain a patent for the Silver Case. Fraud is never presumed. White is deceased, and his testimony cannot be had. A sworn officer of the government has sworn that the surveys

are correct. The department of the government vested with the power to pass upon the proceedings for patent has, without objection, approved them. It therefore results, after a careful consideration of all the testimony in the case, and after making the concession that the proofs show that the Bonanza was swung onto the Silver Case to the extent claimed by complainant, that there was a mistake made by the official surveyor in locating the boundary lines of the two mining claims. There is no evidence in the record upon which to base a finding that fraud was committed by any one. Attention has been called to the fact that the location certificate of the First Dividend was not filed for record until the time for adversing the Bonanza had elapsed; that White was not paid for his services by defendant until after the expiration of the same period. These isolated facts might be material if associated with fraudulent acts, but standing alone they prove nothing.

Is, then, the mistake mentioned such as a court of equity will relieve against in a proceeding of this character? At the threshold we must not forget that this proceeding is not one between contesting claimants to mineral land in a United States land office, nor is it a proceeding to try in court an adverse claim under the statutes of the United States, but it is a proceeding directly attacking a patent for mineral lands granted by the government of the United States. With the patent as the object of attack, we must come armed with the weapons which are necessary to overcome this grant of the government, or defeat is inevitable.

Sections 2325 and 2326 of the Revised Statutes regulate the mode of procedure where adverse claims are filed against applications for patents to mineral lands. Section 2325, among other things, provides:

"If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days

of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of $5.00 per acre, and that no adverse claim exists, and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter."

Section 2326 provides for a stay of proceedings in the land office upon the filing therein, within the 60 days, of an adverse claim, and also provides that the party filing the adverse claim shall, within 30 days thereafter, commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. These provisions provide a method whereby all parties having adverse claims to mineral lands, for which a patent is asked, may have their day in court. If a party fails to file his adverse claim in the land office in the time provided by law, or if, having so filed it, he fails to commence proceedings in accordance with section 2326, he waives his adverse claim. With reference to the proceedings in the land office, the publication of the proper notice for the prescribed period is due process of law. The proceeding is judicial in its character, and in the nature of a proceeding in rem. If there is no adverse claim, a decision of the land office awarding the patent to the claimant is a judgment by default, as conclusive as to the matter adjudicated as a judgment upon contested issues. The expression "it shall be assumed" must be construed to mean "conclusively assumed," as any other construction would defeat the object of the statute. In using the word "conclusively," I do not mean to say that the statute has closed the doors of a court of equity to adverse claimants in every case; but I think it may safely be asserted that the failure to adverse, as provided by the sections referred to, deprives the adverse

claimant of all remedies except those which a court of equity might allow to be urged against a judgment at law. *Wight* v. *Dubois,* 21 Fed. 694; *Kannaugh* v. *Mining Co.,* 16 Colo. 341, 27 Pac. 245; *Hamilton* v. *Mining Co.,* 33 Fed. 562; *Four Hundred & Twenty M. Co.* v. *Bullion M. Co.,* 3 Sawy. 634, Fed. Cas. No. 4,989; *Dahl* v. *Raunheim,* 132 U. S. 260, 10 Sup. Ct. 74; *U. S.* v. *Throckmorton,* 98 U. S. 65; *Vance* v. *Burbank,* 101 U. S. 519.

In *U. S.* v. *Throckmorton,* 98 U. S. 65, the exception to the maxims, "Interest rei publicæ ut sit finis litium," and "Nemo debet bis vexari pro una et eadem causa," is thus stated:

> "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise, or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff, or where an attorney fraudulently or without authority assumes to represent a party, and connives at his defeat, or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these and in similar cases, which show that there never has been a real contest in the trial or hearing of a case, are reasons for which a new suit may be sustained to set aside and annul the former judgment and decree, and open the case for a new and fair hearing."

Of course where a party has had a full and fair opportunity to be heard, he is as much concluded by the judgment as if he actually was heard. 1 Black, Judgm. § 87; *U. S.* v. *White,* 17 Fed. 561; *Howard* v. *City of Huron,* (S. D.) 60 N. W. 803.

In *Vance* v. *Burbank, supra,* it is said:

> "The appropriate officers of the land department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi judicial tribunals are. It has also been settled that the fraud in respect to which relief will be granted in this class of cases must

be such as has been practiced on the unsuccessful party, and prevented him from exhibiting his case fully to the department; so that it may properly be said there has never been a decision and a real contest about the subject-matter of inquiry."

Laying aside the question of fraud, as limited and defined in the cases cited, it is settled that the action of the land department in issuing a patent is conclusive upon all questions of fact coming properly within the scope of its jurisdiction, and is not subject to review by any other tribunal. The question as to what were the true boundaries of the Bonanza and Silver Case was a question of fact, coming properly within the jurisdiction of the land department. *Carson City M. Co.* v. *North Star M. Co.*, 73 Fed. 597; *Doe* v. *Mining Co.*, 54 Fed. 940.

Whether we have in view the sections of the Revised Statutes quoted, or simply the decisions of the land department, which resulted in the issuance of the patents, in either case, in order to succeed in this proceeding, the complainant must bring itself within the operation of some one of the rules under which it is permissible to attack the patent.

It is contended by counsel for complainant that it was prevented from making its defense or adverse claim to the application for the Bonanza patent by the acts of White and the defendant, confederating and acting together for the purpose of suppressing the truth as to the amount of land claimed within the boundary lines of the Bonanza. How and by whom was the truth suppressed? How and by whom was the complainant prevented from adversing the Bonanza claim for patent? If the defendant, in its application for the Bonanza patent, was claiming property that belonged to the complainant, then the complainant was a defendant in that proceeding. Was it served with process? The testimony shows that it was in the manner provided by law. Did it make any defense? None. And there is not a syllable of testimony that any one

prevented it from so doing, or that any one suppressed the truth as to the claim made by defendant in its application for the Bonanza patent. The president of the complainant swears that he had no knowledge of the application for the Bonanza patent till the fall of 1888. This knowledge, which the president did not have, must have been actual knowledge; for when the evidence shows, as it does in this case, that the notice of the application for the Bonanza patent was posted and published as the law requires, then the law says that the complainant had notice, and it will not be permitted to say that it did not. The notice which the law provides is what is required; no more, no less. There is no evidence in the record that anything was done to prevent the complainant from receiving this legal notice. It was a domestic corporation, with its officers, agents and corporators residing at Deadwood, the place where the local land office was situated, and a place but a few miles from the Bonanza claim, and the place where the notice was published. The conditions were most favorable for the giving to the complainant the notice required by law. I think I am justified in saying that the evidence shows two reasons why the Bonanza application was not adversed by the complainant: First, The conflict that was always known by all parties to exist between the Bonanza and Silver Case, whether it amounted to 15-100 of an acre or 1 34-100 of an acre, at the time of the application for patent, was considered of but little value. The second reason is found in the answer of the president of complainant to the question as to whether he knew that any plat was posted: "I did not know anything about it. As I have explained before, I had some other business of more importance to me, and was attending to the mercantile business, and did not pay any attention to mining." These reasons must be correct, or else the complainant had no adverse claim to assert. White was not employed by complainant to adverse the Bonanza patent application;

and not at all until after the official survey of the Bonanza had been made; so that it is impossible to find anything that White did or did not do in reference to the Bonanza that in any way prevented the complainant from presenting its adverse claim. The fact that the complainant had employed White to obtain a patent for the Silver Case did not relieve it of the duty to employ some one to adverse the Bonanza patent application.

It is conceded by counsel for complainant that the officers of complainant were negligent in not better looking after the interest of the corporation, but it is asserted that the corporation ought not to be divested of its property by the negligence of its officers and agents. It is a sufficient answer to this proposition to observe that a corporation acts only through its officers and agents. By their acts a corporation is benefited or injured. By their industry and strict attention to their duties, corporations accumulate property. By their negligence, they may lose it. In the practical affairs of life, the nebulous fiction of our thought called a "corporation" cannot be separated from its living members. Especially is this so in a case, like the one under consideration, where the officers and agents controlled a majority of the stock.

If I am correct as to the foregoing propositions, then the complainant has lost its interest, if any it ever had in the mineral land in controversy. But as the complainant relies strongly for the maintenance of its rights on the employment of White to obtain a patent for the Silver Case, it is necessary to inquire as to what effect that employment had on the rights of the parties.

Peter L. Rogers completed the official survey of the Silver Case on April 21, 1888. This survey was made by Rogers at the request of White, the agent of the complainant. At the completion of the official survey, White, as the agent of complainant knew the boundaries of the Silver Case, and

there is no evidence in the record that will prevent the charging of the knowledge of White to the complainant; and, if the complainant is not to be charged with White's knowledge, wherein did White suppress the truth? On July 24, 1888, the surveyor general of Dakota territory certified to the correctness of the official survey of the Silver Case, and to the plat accompanying the same. The plat and official survey thus certified were true copies of the original; and the plat and survey, not only by lines, figures, letters, and signs, but in so many words, described the area in conflict with the Bonanza as 1.50 acres. On the 30th day of July, 1888, George C. Hickok, as secretary of the complainant, thereunto duly authorized, swore to an application for a patent for the Silver Case, in which application there was a distinct disclaimer of 1.50 acres, as being in conflict with the Bonanza. The notices issued on the filing of this application contained exactly the same declaration. It will not do for the complainant to say that this application was made after the expiration of the period in which adverse claims could be filed to the Bonanza, and therefore the description of the Silver Case could not be otherwise; for, if the complainant is to be charged with White's knowledge, it had known the extent of the conflict since April 21, 1888; and if it is not to be charged with White's knowledge, and its own position, taken as true, that it had no knowledge of the Bonanza patent proceedings until the fall of 1888, then this act of the corporation was a voluntary and deliberate disclaimer of title to the land in controversy. The complainant was the actor in the Silver Case proceedings, and was bound to know what it was claiming. Especially is this the case when we consider the fact that complainant, by its own testimony, always knew that there was some conflict between the Silver Case and the Bonanza. The way the official survey described the amount of conflict rendered it possible for any one who could read to determine

its amount. So it cannot be claimed that there was any suppression of the truth by any one. If the secretary of the complainant could not tell what 1 acre and 50-100 acre meant, after swearing to the application for patent; or, if he knew and did not care, then he was either so incompetent or negligent as to prevent the corporation from asking a court of equity for relief.

Counsel for complainant, at the hearing, advanced a claim for relief, which, while it is inconsistent with the whole theory of the bill, is alleged to arise from the case made by the defendant. The claim is this: Defendant claims that the Bonanza, as originally located, July 27, 1877, was, at its southerly end, 100 feet wider than the law permitted; in other words, it was 400 feet wide, instead of 300. Complainant says, if this is so, then the location was void, for the excess, and that no valid claim was filed for the excess until the Bonanza amended location certificate was filed, March 20, 1888; and as the Silver Case was located January 16, 1884, that the latter location is prior and better in right to the Bonanza amended location to the extent of 100 feet of the mineral land in conflict. Defendant replies that there is no evidence as to where the vein or lode was situated on the Bonanza claim, and that where the vein has not been actually established and run, the point of discovery is presumed to be the middle of the vein, and that a line extended southerly on the Bonanza, from the point of discovery, as shown by the evidence, would throw the excess on the westerly side of the Bonanza; that is, the excess over 150 feet from the middle of the vein would be on the west side. Complainant again avers that the presumption referred to only applies to vertical veins, and not to flat ones, such as the Bonanza is shown to contain. Again, conceding the claim of the complainant, and admitting that the excess in the Bonanza location was on the easterly side, still it simply results that, when the application

for the Bonanza patent was made, the defendant was claiming a portion of the Silver Case, which, if the complainant did not adverse, would be lost to it, as, on this theory of the complainant's case, there could be no fraud and no moving of stakes, but simply a claim for patent, prosecuted to final conclusion, without objection. I see no escape from the conclusion that a decree must be entered dismissing the bill of complaint, with costs.

AMELIA EDELMAN ET AL. v. SAMUEL B. LATSHAW.

(180 Pennsylvania 419; 36 Atl. 926. Supreme Court, March 22, 1897.)

[1]**Where a buyer has information about value which rightfully belongs to the seller** and he conceals such information from the seller, the parties are considered as dealing the same as where a relation of trust and confidence exists and the rule as to the effect of misrepresentation in such cases applies.

Letter addressed to deceased stockholder. A letter or the contents of a letter addressed to a holder of stock containing information as to its value after such stock has been sold is rightfully the property of the present holder.

Facts of the case. Wanted to keep stock in the family. An executor sold some mining stock, considered worthless, belonging to his father's estate, for a nominal sum. Thereafter a letter was received by him, directed to the decedent, offering $2 per share for the stock. The executor repurchased it from the purchaser, concealing the receipt and contents of the letter, stating in terms that the stock had no value and that he bought it back because it had been in his father's name so long: *Held*, that the executor was liable to the purchaser for the full value of the stock.

Appeal from Court of Common Pleas, Montgomery county; H. K. Weand, Judge.

[1]To prevent knowledge of value reaching a party entitled to it is actionable fraud. *Bowman* v. *Bates*, 6 M. R. 363. Concealment of knowledge of latent defect. *Cornelius* v. *Molloy*, 6 M. R. 457. Purchase on letters without personal knowledge of either party. *Cooper* v. *Lovering*, 6 M. R. 662.

Case of purchase of mine at administrator's sale construed as questionable but not fraudulent. *Gray* v. *Quicksilver M. Co.* 68 Fed. 677.

The defendant company's manager agreed to give plaintiff information if his works should develop value extending into plaintiff's adjoining claim. He discovered such value, concealed it, represented that such adjoining ground was "no good," and bought the ground for a small consideration: *Held*, that the managers knowledge of value was the property of his company which he could not sell and that the plaintiff's case was therefore tainted with fraud. *Clark* v. *Buffalo Hump Co.* 122 Fed. 243.

Action by Amelia Edelman and others against Samuel B. Latshaw. From a judgment refusing to take off a compulsory non-suit, plaintiffs appeal. Reversed.

MONTGOMERY EVANS, HENRY D. SAYLOR, and IRVING P. WANGER, for appellants.

N. H. LARZELERE and E. L. HALLMAN, for appellee.

WILLIAMS, J. This action was brought to recover damages for a deceit practiced by the defendant to induce a sale by the plaintiffs to him of certain shares of stock, and it presents an unusual state of facts. The defendant, Samuel B. Latshaw, was an executor of the will of his father, Daniel Latshaw. Among the assets that came into his hands as executor were seven hundred and fifty shares of stock in the New York and Middle Coalfield Railroad and Coal Mining Company, fifteen hundred shares of the Orion Silver Mining Company, and five hundred shares of the Montana Gold and Silver Mining Company. These stocks were considered worthless. They were offered by the executor at public sale and were sold to the plaintiffs who were the highest bidders at prices aggregating $11.40. Nothing was known at the time about the offices or books of either of these companies, and the stock had no known market value. The sale was made in March, 1887. In September, 1891, a letter was written by C. R. Lindsey to Daniel Latshaw, the deceased former owner, inquiring if he still held the seven hundred and fifty shares of the New York and Middle Coalfield Railroad and Mining Company and stating that he could place these shares at $2.00 per share if the owner desired to part with them, though they had no market value. The defendant opened this letter and at once began a correspondence with Mr. Lindsey looking to the sale of the stocks to him for the price offered. He also wrote to Saylor, one of the plaintiffs, offering $25.00 for the stock,

stating his belief that the shares had no intrinsic value, but that he wanted them because his father had been so long a holder of them. The plaintiffs replied to this letter saying, "If as you state the stock has no value and you want it on account of being in your father's name so long, you can have it for fifty dollars, though I do not care to sell it." He afterwards arranged to meet the plaintiffs, when he accepted their offer and received six hundred of the shares, the certificate for the remaining one hundred and fifty shares having been mislaid so that it could not be delivered at the time. At this interview, Saylor inquired of the defendant why he wanted the stock. He replied, "I want it as a relic of my father's effects. It is intrinsically worth nothing, but he had it so long." Saylor replied, "If that is what you want it for, I am willing to transfer the stock to you." The stock was transferred to him. Within a few weeks the plaintiffs discovered the imposition that had been practiced upon them, tendered the $50.00 to the defendant and demanded the return of the stock. This was refused. A bill in equity was then filed asking the cancelation of the transfer by the plaintiffs and a decree requiring the return of the stocks. The stocks turned up in the hands of an innocent purchaser. For this reason and because an adequate remedy existed at law, the bill was dismissed. This action was then brought, and it turns upon the validity of the sale by Saylor and his co-owners to Latshaw in October, 1891. At the conclusion of the plaintiff's case, in which all the facts above recited fully appeared, the learned judge of the court below entered a compulsory nonsuit, for which he gave five reasons which he stated thus:

"1. The alleged false representations as to value will not avoid the contract.

"2. Plaintiffs did not rely upon the statement as to value.

"3. There was no evidence that defendant knew that the stock had any market value.

"4. Plaintiffs had investigated the matter and had as

good an opportunity as defendant of ascertaining the condition of the company.

"5. The representations made by the defendant do not constitute such a fraud as would vitiate a contract."

The second of these reasons is a clear mistake of fact. That the plaintiffs did rely on the defendant's statement that the stock had no value is clear from the conversation had before the stock was transferred to him. At that time, Saylor said to Latshaw, "Now, Mr. Latshaw, I want to know what there is in the stock that you appear so anxious to have it at this time? You laughed at me at the time I purchased it, and said it was not worth the paper it was written on. Why do you want it?" Latshaw made reply, "It is valueless; it is intrinsically worth nothing; but I want it as a relic of my father's effects because he had it so long." Saylor then replied, "If that is what you want it for, I am willing to transfer the stock to you." In their letter to the defendant written a few days before the transfer, they expressly put their willingness to sell to him on his representation that the stock had no value. "If, as you state, the stock has no value, and you want it on account of being in your father's name so long, you can have it for $50.00, though I do not care to sell it." The third reason is unimportant. It was not the market value, but the actual value that the defendant knew and misrepresented in this transaction. He had Lindsey's letter, which did not belong to him, but to the owners of the stock, in his pocket, offering $1,500 in cash for these shares, when he stated to the owners, "this stock is valueless; it is intrinsically worth nothing. I want it not for its value, for it has none, but for its associations with my father, and because of his long ownership." The market value under the facts of this case is immaterial. The actual value was $1,500 at least, and this he knew, because as executor of his father he had come into possession of a letter addressed to him as the former owner of these shares, and which it was his duty to forward

to the actual owners who had succeeded to his father's title, and had a moral right, if not a legal one, to the information the letter contained. The same thing must be said of the fourth reason. It overlooks the actual situation of the parties in this case in the pursuit of a general principle which is not applicable. This is not the case of a purchase made by one dealing with a vendor having equal advantages and opportunities for knowledge with himself, but it is the case of one who has information intended for and belonging to the owner which he withholds from him. This really creates a sort of confidential relation between them. The executor who has made the sale to the plaintiffs with an offer in his pocket intended for the owners, and to the possession of which he has no claim as against them, goes to them to negotiate for the stocks. He not only withholds from them the letter which is theirs, but represents what he knows to be absolutely false both as to the value of their stock and his own reason for wishing to purchase it. The fourth reason like the second rests on a misapprehension of the facts. So far as the mere matter of market value is concerned, it is possible the parties stood on common ground, but so far as the actual value is to be regarded, they did not. The defendant had the fullest knowledge through the letter of Lindsey, which really belonged to the owners of the stock, and which he improperly withheld from them, of what the shares could be sold for, while the plaintiffs were without any knowledge upon the subject.

The first and fifth reasons may be considered together. They raise the question whether the false representations made in this case by Latshaw were a fraud upon the plaintiffs. We recognize the rule quoted from Benjamin on Sales by the learned judge of the court below, and have no disposition to modify it. Both the purchaser and the seller must, as a general rule, exercise and rely upon his own judgment as to the value of the thing which is the subject of negotiation. The rule of *caveat emptor* applies to such sales, and the ordi-

nary "dealer's talk" will not give rise to an action by the disappointed party. But there is a limit beyond which false representations as to collateral matters used as an inducement to the trade will vitiate the sale. *Smith, et al* v. *Smith,* 166 Pa. 563; 31 Atl. 343. So, while it is true, as was held in *Clark* v. *Everhart,* 63 Pa. 347, that a false statement of a material matter will not overthrow a bargain unless the false statement was the means of inducing it, yet when parties treat on a basis of trust and confidence the rule is to hold the party making the representations bound by them. Latshaw had exact information that the stock was worth at least $1,500. This information belonged to the owners of the stock. He withheld it from them, and represented that the stock had no intrinsic value whatever, but was absolutely valueless. The falsehood was relied upon by the plaintiffs, and induced a sale of the stock to him for $50.00 which he knew at the time to be worth $1,500. This was a gross fraud, perpetrated by means of the withholding of Lindsey's letter from the parties to whom it belonged, and the substitution therefor of his own false and fraudulent representation that the stock had no value. Such a representation is by no means a case of "dealer's talk," or of the ordinary depreciation of another man's goods in order to secure them at the best price possible. Nor yet is it the case of a simple falsehood told to induce a sale. It is a falsehood told by one who by virtue of his possession of their letter was bound to tell the owners the truth. He could not suppress an offer intended for, and belonging to, the owners of the stock and knowingly and wilfully misrepresent its value to them to induce a sale to himself for a grossly inadequate price. This is not up to the low level of business morality, and ought not to be tolerated.

The judgment is reversed and a new venire ordered that the case may be fully heard before a jury.

HENSZEY ET AL. v. LANGDON-HENSZEY COAL MINING CO.

(80 Federal 178. Circuit Court, Eastern District North Carolina. March 26, 1897.)

[1]**Inspection allowed to stockholder.** A petition by a stockholder and bondholder of an insolvent company to inspect a mine either in person or by agent, with a view to having the receiver in charge thereof removed, is in the nature of a motion made for the production, by parties, of books or writings in their possession, or motion for inspection of writings or examination of parties before trial, and being made by a party in interest, and entitled to the knowledge sought, will be granted by a federal court.

Such inspector is the private agent of the party for whom he acts and by his appointment does not in any way become officially connected with the court or case.

JOHN W. HINSDALE, for petitioner.

S. P. LANGDON, MACRAE & DAY, WOMACK & HAYES and SIMMONS & WARD, for receiver.

SIMONTON, Circuit Judge. A petition has been filed in the main cause by S. P. Langdon, a stockholder and bondholder of the defendant company. The purpose of the petition is to secure the removal of the receiver. One of the grounds for removal is mismanagement and waste on the part of the receiver. The receiver is in charge of the mines worked by the company, and in exclusive possession of them, under the

[1]A stockholder although by the deed of settlement entitled to examine the books wherein the proceedings of the company are recorded has no right to inspect the minutes of the meeting of directors. *Reg.* v. *Mariquita M. Co.* 1 El. & El. 289.

A stockholder in a proper case may have mandamus to allow his inspection of the company's books. *Phoenix Co.* v. *Com.* 113 Pa. 563; 6 Atl. 75.

For construction of the Nevada statute allowing stockholders the right to inspect the mine, see *Deidesheimer, in re*, 8 M. R. 41.

order of this court. The motion now under consideration is that the petitioner, S. P. Langdon, be permitted to examine the mines by a person named Davis, in order that he should see if the grounds upon which he has based his petition are well founded. This motion the receiver resists. The discussion of the motion seems to proceed on the idea that, if the motion be granted, the person selected by Langdon will be clothed with a sort of official responsibility, and will make a report for the consideration of the court with more or less authority. This is by no means the case. If the motion be granted, Davis will be the agent of Mr. Langdon; no more and no less. He may or may not testify to all that he sees. If he does testify, his evidence will be taken as that of any other witness, subject to any proper exception, liable to any rebuttal, and exposed to any attack. Neither the court, nor any party to the cause,—least of all the receiver,—will be responsible for him in the smallest degree.

The motion appears to me to be analogous to the motion made for the production, by parties, of books or writings in their possession, which contain evidence pertinent to the issue (Rev. St. U. S. § 724), and to the motions under the Code practice for admission or inspection of writings or examination of the parties, before trial. The petitioner, a party in interest in the main cause, one of those whom the receiver represents, wishes to examine the mines in charge of the receiver. He cannot do so in person. He wishes to do so by agent in whom he confides. He is entitled to this knowledge. It is for himself only, certainly, in the first instance. It is ordered that the petitioner have access to the mines for the purpose indicated at such time as will not interfere with the working thereof, either in person or by any one agent whom he may select. The receiver may require that he himself or some other person selected by him shall accompany the agent selected by the petitioner; this visit to be limited to one occasion, the petitioner to be at liberty to employ as his agent Evan H. Davis.

SCHEEL v. ALHAMBRA MINING CO.

(79 Federal 821. Circuit Court, District of Nevada. April 5, 1897.)

[1]**Right to dump appurtenant to deed for tunnel.** The grant of a tunnel right through a specific piece of ground, "together with all and singular the appurtenances thereto belonging," carries with it by implication every incident and appurtenance thereto including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right.

This is a bill in equity to quiet title to the Metropolitan mine and mining claims, owned by the plaintiff. The suit was commenced in the state court, and thereafter removed to this court, on motion of defendant, upon the ground of diversity of citizenship of the parties.

The bill, as reformed in this court, charges that defendant, in running a tunnel through and near plaintiff's mine, wrongfully and unlawfully, without plaintiff's consent, dumped and deposited waste rock and earth from said tunnel upon plaintiff's claim; that defendant claims an estate and interest in the Metropolitan mine adversely to plaintiff, viz., an easement and servitude therein, and the right to dump waste rock thereon; that said claim is false and invalid, and casts a cloud upon plaintiff's title thereto. The defendant, in its answer, "alleges that whatever right, title, or interest plaintiff may have in said Metropolitan claim is subject to the right of defendant to run, maintain and work said tunnel, and to the right of defendant to dump waste rock on said Metropolitan claim." It bases its right to use the land owned by plaintiff at the mouth of the tunnel, upon the ground that it is, and ever since 1873 has been, the owner of, in possession of, and entitled to the possession of the mining claim and premises known as the "Alhambra Mining Claim,"

[1]*North Am. Co.* v. *Adams*, 104 Fed. 404. *Bushnell* v. *Proprietors*, 3 M. R. 258.

Ejectment lies for ground used as a dump, upon possession alone against an intruder. *Campbell* v. *Silver Bow Co.* 49 Fed. 47.

Grant of the coal and certain mining rights construed to carry use of the surface for dump for coal got by instroke as well as the coal conveyed. *Genet* v. *Delaware Co.* 122 N. Y. 505; 25 N. E. 922.

together with the tunnel mentioned in the complaint, "with the right to dump ore and waste rock upon the surface of the Metropolitan mining claim;" that said tunnel, when commenced, at the mouth thereof, was upon vacant and unoccupied public mineral land; that on April 6, 1887, its predecessor in interest and grantor located a tunnel right and location under the provisions of section 2323 of the Revised Statutes, commencing at the mouth of the tunnel, described in the complaint, and running through the Metropolitan claim into, along, and upon the ground of the Alhambra claim; that said location was made with the knowledge of said plaintiff and his grantor; that defendant and its predecessor in interest ran said tunnel upon said tunnel right and location, and fully complied with the mining laws in regard thereto; that long prior to the commencement of this suit the plaintiff and his grantor, for a valuable consideration, sold and conveyed to the defendant the land through which the tunnel runs. The evidence shows that on June 30, 1874, Herman J. T. Scheel (plaintiff's father) obtained a patent to the Metropolitan lode claim; that on February 23, 1887, he conveyed his title to said lode claim to his son, Herman B. J. Scheel, the plaintiff herein; that plaintiff holds the legal title to said lode claim, except as to such portions of the surface ground which, on April 4, 1888, were conveyed by deed to the defendant. The land conveyed is described in the deed as follows: "That piece or strip of land twenty (20) feet wide, commencing at the mouth of the tunnel location of John O. Strauch, and running thence west 184 feet, more or less, to the east line of the Alhambra Mining Company's land, and situated on the ground of the Metropolitan Mining Company; * * * the same being the land through the center of which said tunnel of John O. Strauch has been run. Nevertheless, I hereby reserve to myself (ourselves) the right to use said tunnel to work our own mines. * * * We also bargain and sell, convey and confirm, to said second party, its successors and assigns, forever, a right of way twenty (20) feet wide over the said lands of said Metropolitan Mining Company from the mouth of the said tunnel location of John O. Strauch to the county road; the said right of way being over the road now used by them in going to and returning from said tunnel. It is further hereby agreed that the party of the second part does not claim any ore in the ground hereby conveyed, and the conveyance hereby made only conveys the surface ground and the tunnel." On February 6, 1874, the defendant obtained from the United States a patent to the Alhambra lode, situate west of and adjoining the ground of the Metropolitan lode, for 2,000 feet in length. Four hundred and fifty feet of this ground on the Alhambra lode was afterwards conveyed to H. J. T. Scheel, and designated as the "Segregated Alhambra." On February 6, 1887, John O. Strauch, who

is, and for the past 15 years has been, the president of the defendant, located a tunnel right running through the ground of the Metropolitan Mining Company, claiming "all veins or lodes within 3,000 feet from the face of said tunnel on the line thereof, not previously known to exist, which are or may be discovered in said tunnel." This tunnel right and location was, on April 4, 1888, conveyed by Strauch to the defendant. The tunnel passes through the ground of the Metropolitan Company into the ground of the Alhambra Company. It was run a distance of about 1,012 feet before the location of the Alhambra lode, and has since been extended a distance of nearly 500 feet. Drifts have been run from the tunnel a distance of between 700 and 800 feet. The waste rock and earth from these drifts were dumped on the Metropolitan ground at the mouth of the tunnel. The dump is about 200 feet long, 80 feet wide, and 30 feet deep. At the close of the testimony, the defendant, by leave of the court, amended its answer so as to conform to the proofs, by adding the following averments: "Defendant alleges that the tunnel mentioned in said bill of complaint was commenced by said defendant prior to the year 1873, under the direction and supervision of Herman J. T. Scheel, the predecessor in interest and grantor of the plaintiff in this action, to the Metropolitan mining claim described in said bill of complaint, and was continued and constructed under said plaintiff's predecessor in interest and grantor until he conveyed said Metropolitan claim to said plaintiff; and after such conveyance said tunnel was continued and constructed by said defendant under the supervision and direction of said plaintiff for said defendant until the year 1894; and that from the year 1873 to the year 1894 said defendant expended in the construction of said tunnel the sum of over ten thousand dollars, and during the whole of said time said defendant, under the direction of said plaintiff and his said grantor, dumped the waste rock from said tunnel upon said Metropolitan claim. Defendant further alleges that by reason of the premises said plaintiff is estopped from denying defendant's right to run said tunnel and dump waste rock therefrom upon said Metropolitan mining claim." The evidence given at the trial fully sustains the averment of facts set out in this answer. It shows that the plaintiff never made any objection to the use of the dump by the defendant until 1894, when a dispute arose between the parties about a claim presented by the plaintiff for services, which the defendant refused to pay. This suit was commenced June 6, 1894.

ROBERT M. CLARKE, for plaintiff.

W. E. F. DEAL, for defendant.

HAWLEY, District Judge (orally). Did the right to use the surface ground at the mouth of the tunnel as a dump pass by the conveyance from the plaintiff to the defendant of the tunnel right as an incident or appurtenant to the land conveyed? The deed was a bargain and sale deed. It granted, bargained, sold, and conveyed the premises described in the statement of facts, "together with all and singular the * * * appurtenances thereto belonging." The conveyance of the land through which the tunnel runs would be of but little, if any, value without the use of the surface ground at the mouth thereof as a dump. In fact, the tunnel could not be successfully run for the purposes for which it was located and constructed without such right or privilege. A deed in general terms passes everything which is a constituent part of the land granted. Was the right to dump the waste rock on the plaintiff's land an incident or appurtenant to the use and occupancy of the tunnel? The word "appurtenances," in common parlance and legal acceptation, is used to signify something belonging to another thing as principal, and which passes as incident to the principal thing. 1 Bouv. Law Dict. "A right annexed to land is appurtenant where the connection has arisen either by grant or by prescription from long adverse enjoyment. In such a case the appurtenant thing passes with the thing to which it is annexed whenever a conveyance or transmission of the latter takes place." 1 Rap. & L. Law Dict. An easement is defined to be "a liberty, privilege, or advantage which one man may have in the lands of another, without profit. It may arise by deed or prescription." 1 Bouv. Law Dict. In construing the deed in question, it is the duty of the court to take into consideration the situation of the land, the circumstances attendant upon the location of the tunnel right, the object and purpose for which it was acquired, how used, the particular situation of the parties, their knowledge of the character of work to be done in the tunnel, the necessities which existed, if any, of having a right to store

the waste rock and earth upon the adjacent land at the mouth of the tunnel, and the acts and conduct of all the parties in relation thereto, in order to arrive at the intent of the parties in conveying the land through which the tunnel runs. The plaintiff reserved the right to use the tunnel for the purpose of working the Metropolitan mine. In the working of the mines in question either by the plaintiff or the defendant, in extracting and removing the pay ore therefrom through the tunnel, there would naturally arise a necessity of making some disposition of the waste rock and earth that had to be removed in the prosecution of the work. The result was that the surface ground at the mouth of the tunnel was used as a dump for that purpose. At the time the conveyance was executed, and for many years prior thereto, Herman J. T. Scheel (the father) was engaged in running the tunnel for the defendant, and under his direction the waste rock and earth were deposited at the mouth of the tunnel on land to which, at the time he held the legal title. The same condition of affairs existed afterwards, continuously, either under the direction of the father or Herman B. J. Scheel, the son, until 1894. From the beginning of the first work in the tunnel up to the time this case was tried the ground in question was used as appurtenant to the tunnel, and its use was necessarily incident to the full enjoyment of the tunnel for the purposes for which it was constructed and used. There are many things which pass by a conveyance of land as appurtenant or incident thereto although not expressly named in the deed. If the description in the deed does not mention the things claimed as appurtenant, the same will be held to pass by the deed, if it clearly appears from all the transactions between the parties, and the circumstances and conditions of the property and of the use and enjoyment of the same, that the things not so mentioned are necessarily incident thereto.

In *Bank* v. *Miller,* 6 Fed. 545, 551, Judge Deady said:

"That a sale of any real property carries with it any easement or privilege which is necessary to its enjoyment, and at the time is in use thereon and therewith, as an appurtenance in fact, although not technically so at law; and this upon the presumption, more or less cogent, according to the circumstances, that it was the intention of the parties to the agreement of sale that it should pass with the property to which it was then apparently subservient."

In *Insurance Co.* v. *Patterson,* 103 Ind. 582, 586, 2 N. E. 188, 191, the court said:

"Where, during the unity of title, an apparently permanent and obvious servitude is imposed on one part of an estate in favor of another, which at the time of the severance is in use, and is reasonably necessary for the fair enjoyment of the other, then, upon a severance of such ownership, whether by voluntary alienation or by judicial proceedings, there arises by implication of law a grant or reservation of the right to continue such use. In such case the law implies that with the grant of the one an easement is also granted or reserved, as the case may be, in the other, subjecting it to the burden of all such visible uses and incidents as are reasonably necessary to the enjoyment of the dominant heritage, in substantially the same condition in which it appeared and was used when the grant was made."

In *U. S.* v. *Appleton,* 1 Sumn. 492, Fed. Cas. No. 14,463, the court held that, where a house or store is conveyed by the owner thereof, everything passes which belongs to, and is in use for, the house or store, as an incident or appurtenance. Mr. Justice Story, in his opinion, said that this rule "is implied from the nature of the grant, unless it contains some restriction, that the grantee shall possess the house in the manner, and with the same beneficial rights, as were then in use and belonged to it. The question does not turn upon any point as to the extinguishment of any pre-existing rights by unity of possession, but it is strictly a question what passes by the grant."

In *Voorhees* v. *Burchard,* 55 N. Y. 98, 102, the land conveyed was designated as "being the mill property of the said Ransom Rathbone in the village of Rathboneville,"

then giving metes and bounds, embracing 7.9 acres of land, with appurtenances. It was shown by the evidence that in front of the mills was an open space, extending to the highway, containing 62 rods of land, which was the locus in quo in the action of trespass brought by the plaintiff, and was not included within the boundaries of the deed, but had been used as a mill yard for the deposit of logs and lumber sawed at the mill for 25 years by Ransom Rathbone prior to his conveyance. The trespass complained of was the deposit of saw logs on the open space in front of the mills. It was shown that the entire use of this mill yard was necessary to the beneficial enjoyment of the mills. The court held that, upon the facts, an easement in the locus in quo for a way and for a mill yard was carried with the principal thing conveyed, and, among other things, said:

"But the controlling thing is this: How much and what was necessary for the mill? the actual use by the successive owners being evidence of this. * * * It is the necessity of the mill for its full and free enjoyment which controls in indicating what and how much shall pass as an incident appurtenant to that in terms conveyed."

A tunnel right through a specific piece of ground is a right to enter upon and occupy the ground for the purpose of prosecuting work in the tunnel, and to extract therefrom waste rock or earth necessary to complete the running of the tunnel, and making such use thereof, after completion, as may be necessary to work the mining ground or lode owned by the party running the tunnel. By implication the grant of such a right carries with it every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right, such right or easement being necessary for the full and free enjoyment of the tunnel right.

The views herein expressed. and conclusions reached are

sustained by the following additional authorities: *Sparks* v. *Hess*, 15 Cal. 187, 196; *Cave* v. *Crafts*, 53 Cal. 135, 138; *Farmer* v. *Water Co.*, 56 Cal. 11, 13; *Smith* v. *Cooley*, 65 Cal. 46, 48, 2 Pac. 880; *Jackson* v. *Trullinger*, 9 Or. 393, 398; *Scott* v. *Michael*, 129 Ind. 250, 254, 28 N. E. 546; *Coolidge* v. *Hager*, 43 Vt. 9, 14; *New-Ipswich Factory* v. *Batchelder*, 3 N. H. 190; *Lampman* v. *Milks*, 21 N. Y. 505; *Ward* v. *Warren*, 82 N. Y. 265, 268; *Holloway* v. *Southmayd*, 139 N. Y. 390, 402, 34 N. E. 1047, 1052; *Witte* v. *Quinn*, 38 Mo. App. 682, 692; *Bowling* v. *Burton*, 101 N. C. 176, 180, 7 S. E. 701; *Gurney* v. *Ford*, 2 Allen, 576; *Ammidown* v. *Ball*, 8 Allen, 293. It is therefore unnecessary to consider any of the questions upon the other points raised by the pleadings, and especially upon the point as to whether or not an estoppel was properly pleaded or proved. The evidence which was objected to, as to its insufficiency to establish an estoppel, was properly admitted in evidence as tending to show the situation of the land, and the conduct of the parties, and as bearing upon the question of their intentions at the time the conveyance of the tunnel right was executed; and it matters not whether it was sufficient for the purpose of establishing an estoppel, as the points discussed are absolutely conclusive as to the rights of the parties. The plaintiff has the legal title to the land covered by the dump at the mouth of the tunnel, which is the locus in quo in controversy; but he holds such title subject to an easement and right of way of the defendant to use said land, and so much thereof, and no more, as may be necessary for a dump, with the right to deposit any and all waste rock and earth conveyed through the tunnel owned by the defendant. A decree will be entered in accordance with the views expressed in this opinion.

GEORGE H. CASEY ET AL. v. THEOPHILE THIEVIEGE ET AL.

(19 Montana 341; 48 Pac. 394. Supreme Court. April 5, 1897.)

[1]**A known lode such as to be excepted** from the grant of a placer patent must have been clearly ascertained at date of application and be of such extent as to render the land more valuable on that account and to justify its exploitation.

The burden of proof is on the party alleging the existence of the known lode.

Facts of the case. Evidence that at the date of an application for a placer patent, made after the property had been worked as a placer mine for several years, there were some surface indications of veins of mineral-bearing rock, but that they had not been examined with a definite view to working them, and that no assays had been made, and testimony of a witness who had sunk on some of them that they "played out," and of another witness that there were no veins with clearly-defined walls, negatives a claim that there were "known" veins, within Rev. St. U. S. § 2333, excluding such veins from the operation of the placer patent.

Presumption. Where a quartz lode claim is located within a placer claim, which lies in a town or city or in a town site, after an application for a patent to the placer claim has been made, there is a strong presumption in favor of the placer patent.

Appeal from District Court, Silver Bow County; J. J. McHatton, Judge.

Action by George H. Casey and others against Theophile Thieviege and others. Judgment for defendants, and plaintiffs appeal. Reversed.

Appellants (plaintiffs below) brought an action in ejectment against 73 defendants to recover possession of certain land lying within the limits of Butte City, Mont. A judgment was recovered against all of said defendants except the respondents in this appeal. The facts are substantially as follows: The grantor of plaintiffs, one Black, filed an appli-

[1] *Migeon* v. *Montana Ry.* 18 M. R. 446.

cation in the proper United States land office for a patent to a certain placer claim, about four acres in area, on June 20, 1879. The patent was issued for said tract, known as the "Black Placer," on November 9, 1891. During some 12 years prior to said application the said land had been worked as a placer mine by different parties. Certain of these parties testified in behalf of respondents that in digging and sluicing the Black placer for gold, as was usual in respect to other placer grounds in the vicinity, they had frequently encountered strata and streaks of quartz, had observed croppings on its surface indicating the existence of quartz leads, and that under these croppings, between walls of granite on bedrock, veins of quartz had been exposed, bearing, in their opinion, silver and other precious metals; that three such veins, as the surface was stripped off here and there in the course of their placer mining, could be plainly traced across said tract, and were readily observable by means of the croppings aforesaid, and at the points of the bedrock exposure aforesaid, both prior to and after the date of the application of Black for his patent. One of the witnesses testified that he had sunk on some of these leads on the Black placer that "played out," and that he did not know at the time that there were quartz leads of any value on the ground. Another witness testified that when one of these three traceable leads had been exposed on bedrock, it was three or four feet wide, and his partner thought it "a favorable prospect, and wanted to locate it, and asked his advice." He told him "that they had a hundred locations too many" already. The ground prior to 1878 was generally regarded as valuable for placer mining only, according to the placer miner who testified as to value. No assays were made during the placer-mining days. On April 20, 1878, one Hirbour and one Hume located a quartz lead, and called it the "Leo." This claim included a large portion of the Black placer. The discovery shaft of the Leo was 40 to 50

feet west of the Black placer line, and the lead on which the discovery was claimed to have been made was, in the opinion of certain witnesses, one of the three traceable veins testified to as extending through said Black placer. The first year Hirbour and Hume, according to the former's testimony, sunk their discovery shaft to a depth of 18 or 20 feet. The second year Hume did the representation work on the Leo in the fall of 1879. Hirbour also testified that in 1878 or 1879 he himself or Hume sunk a shaft on the Leo within the Black placer limits, which was about 6 feet by 4 feet, and 10 feet deep, and that there was exposed therein a vein of silver-bearing quartz from which he (Hirbour) took a few pounds of ore. Subsequently, however, Hirbour modified this testimony by stating that he could not swear that the last-mentioned shaft was within the boundaries of the Black placer.

The Leo was represented for two years only; $200 of work alone being expended in its representation. Then Hirbour and Hume abandoned the claim, because of difficulty and expense in working it. In the fall of 1879, one Largey relocated the Leo claim as the "Montana Central" quartz claim. Largey testified that in a shaft of the Leo, which was about eight or nine feet deep, he found what he designates as a "blind lead," and that this was the discovery on which he based his location. He testified that the lead he discovered was below, and detached from, the croppings which induced him to prospect the said vein. These croppings ran into the Black placer ground. Largey also stated that he had done considerable work on the Montana Central, having represented it for a number of years, and in the course of it had sunk shafts within the Black placer; and that in sinking these shafts he had found quartz, but no lead with well-defined walls. He also testified that the surface of the Black placer was covered with debris from the old placer diggings, and that the bedrock was visible in very few places. Largey

had instituted a contest in the United States land office with the owners of the Black placer, which resulted in a compromise, whereby the owners of the Black placer were to give him (Largey) a portion of their ground, and in exchange therefor he was to give them a portion of the Montana Central ground. On January 4, 1887, the Blue Dick quartz lode was located by certain of the respondents. It embraced a large portion of the Black placer ground. The vein of the Blue Dick was one of the three traceable leads testified to as crossing the Black placer. The discovery shaft on the Blue Dick, according to the testimony of the locators, was about 40 or 60 feet deep. In this shaft was found a vein of quartz containing silver, and also native copper. Two assays were made of specimens of ore taken from this discovery shaft at about the time of its discovery, January 4, 1887, one of which ran 29 ounces in silver to the ton, and the other 11 ounces to the ton. It does not appear that it had been worked with the end in view of extracting ore from it. At the time of the institution of this suit the Black placer presented a different appearance from the one it wore in the days of placer mining. Sawdust from a wood yard had been thrown about; some dwelling houses and cabins had been built upon it; and, although the croppings still remained in places, much of the exposed bedrock had been covered again. The Black placer adjoined the original town site of Butte City. In their complaint, plaintiffs asked as damages the rental values of the premises. The following special questions, by request of defendants, were submitted to the jury, each of which was answered in the affirmative: First. "Was there, at any time before the 20th of June, 1879, a vein, lead, or lode of quartz or other rock in place bearing any gold, silver, lead, tin, or copper whatsoever, known to any person or persons to exist, within the boundaries of the placer claim and ground in controversy in this action?" Second. "If such vein, lead, or lode did exist, could its

existence have been ascertained before the 20th day of June, 1879, by Leander M. Black, the applicant for the patent introduced in evidence in this action, or by any other person or persons examining the said ground in dispute with an honest endeavor to learn or ascertain if it contained any such veins or lodes?" The jury also found a general verdict against plaintiffs and answered two other questions submitted, adversely to them. Plaintiffs appeal from the order of the district court denying a motion for a new trial, and from the judgment rendered on the verdict and special findings.

F. T. MCBRIDE, for appellants.

THOMPSON CAMPBELL, J. T. BALDWIN, and W. I. LIPPINCOTT, for respondents.

BUCK, J. (after stating the facts). This case is the result of a conflict between a placer patent and a quartz lode location made subsequent to the application for the placer patent. In investigating the questions involved, we accord full force and effect to the general rule that, where there is a conflict in evidence on a trial, the verdict should not be disturbed on appeal. The verdict in this case, then, must be sustained, if there is competent evidence to support it. We must accept as proven the fact that at the time the application was made for a patent to the Black placer claim its surface indicated veins of mineral-bearing rock in place. It is true that witnesses on behalf of respondents testified positively that such veins or lodes were in the claim, and plainly visible as veins or lodes at the time of such application. But, inasmuch as these witnesses gave in detail the facts on which they based this assertion, these facts, and not the mere assertion based thereon, however positively made, should be considered. The assertion was in the nature of a legal conclusion, being

only the expression of an opinion. Hence in what we deem proven by respondents we do not go to any greater extent than to concede that they showed in evidence that the surface appearance of the Black placer at the date of the application for patent indicated by croppings and in exposed bedrock the existence of lodes or veins of mineral-bearing rock in place.

From the questions submitted to the jury and the argument of their counsel in this court, it would seem that respondents contended for this proposition of law, namely: that when an application for a placer patent is made, any lode or vein of quartz or other rock in place containing any gold, silver, lead, tin, or copper whatsoever, known to exist within the boundaries of the claim (or the knowledge of whose existence could be ascertained by one examining the ground in an honest endeavor to acquire such knowledge), is excepted by section 2333, Rev. St. U. S., from a patent issued on such application. If this is the law, the determination of this appeal might be attended with more difficulty than it is; for it also appears from the evidence herein—admitted without objection—that some years after the application for a patent for the Black placer claim, in the discovery shaft of the Blue Dick quartz lode claim, sunk on one of the three so-called "traceable veins" crossing the Black placer at the time of application for its patent, a vein of ore was found carrying as much as 29 ounces of silver to the ton, as shown by one of the two assays made. But we cannot agree with the proposition that this is the law. It virtually eliminates from the question of what is the vein or lode known to exist, the elements of value, character, and extent of the existing vein or lode. In *Migeon* v. *Railway Co.*, 23 C. C. A. 163, 77 Fed. 256, Judge Hawley, speaking for the United States circuit court of appeals, says: "This section [2333] of the statute was primarily intended for the benefit and protection of the locators of placer claims. If a lode is known to exist

within the boundaries of a placer claim, the applicant for a patent must state that fact, and then, by paying $5 an acre for that portion of the ground and $2.50 for the balance, a patent will issue to him, covering both the lode and placer ground; but, if the lode is known to exist, and is not included in the application for a patent, then it will be construed as a conclusive declaration that the owner of the placer claim has no right of possession by virtue of his patent for the placer ground to the vein or lode. It matters not whether there is a lode or vein actually within the limits, which subsequent developments may prove; if it is not known to exist at the time of the application, the patent for the placer claim will include such lode or vein. In such cases the supreme court has repeatedly declared that it is not enough that there may have been some indications, by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other precious metals to justify their designation as 'known veins or lodes;' that, in order to meet that designation, the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account, and justify their exploitation. *Mining Co.* v. *Reynolds,* 124 U. S. 374, 383, 8 Sup. Ct. 598, 603; *U. S.* v. *Iron Silver Min. Co.,* 128 U. S. 674, 683, 9 Sup. Ct. 195, 199; *Iron Silver M. Co.* v. *Mike & Starr M. Co.,* 143 U. S. 394, 404, 424, 12 Sup. Ct. 543, 545, 553; *Sullivan* v. *Mining Co.,* 143 U. S. 431, 12 Sup. Ct. 555; *Brownfield* v. *Bier* (Mont.) 39 Pac. 461, and other authorities there cited.

"This construction as to the meaning of section 2333 is, in our opinion, founded in reason, and is in harmony with the construction given by the courts to the other sections of the statute relative to the rights of locators of mining claims upon the public lands of the United States. But, in any event, the rule, as above stated, is now too well settled to be departed from." In the case of *Iron Silver M. Co.* v. *Mike*

& Starr M. Co., 143 U. S. 394, 12 Sup. Ct. 543, cited supra, the court says: "It is undoubtedly true that not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute." And further the court says: "The amount of the ore, the facility of working and reaching it, as well as the product per ton, are all to be considered in determining whether the vein is one which justified exploitation and working." In *Brownfield* v. *Bier,* 15 Mont. 403, 39 Pac. 461, the *Iron Silver M. Co.* v. *Mike & Starr M. Co. Case, supra,* is elaborately discussed. Our supreme court there says: "But in that case the contention within the court seems to us to have been more upon the question of facts in that particular case than upon a view of the law;" and proceeds to quote, as declaratory of the law, language taken from the majority opinion of the court, and also from the dissenting opinion rendered therein by Mr. Justice Field and Associate Justices Harlan and Brown. Certain portions of this language are requoted below.

But the respondents urge, to meet this view entertained by the Montana supreme court of what was held in the *Mike & Starr M. Co. Casé,* that the question of value is one solely for the jury, and the facts in this case are stronger in favor of the verdict than those successfully invoked for the same purpose in the *Mike & Starr M. Co. Case.* This language is relied upon from the last-named decision to uphold the first contention: "It is, after all, a question of fact for the jury. It cannot be said, as a matter of law, in advance, how much of gold or silver must be found in a vein before it will justify exploitation, and be properly called a 'known' vein."

As to what were the particular facts involved in the *Mike & Starr M. Co. Case,* the justices of the supreme court of the United States were divided in opinion, and this fact led the

supreme court of Montana to use the language it did in *Brownfield* v. *Bier, supra.* The majority of the justices claimed the record showed that prior to the application for a patent to the placer claim of the Iron Silver Company within the limits of said placer a tunnel had been run to the extent of 400 feet; that in said tunnel, about 75 or 80 feet from its mouth, a 15-inch vein of quartz, with distinct walls of porphyry, had been disclosed; and that assays of the ore taken from this vein had been made (apparently at the time it was found), and showing that the same was valuable gold-producing ore. Speaking of the facts involved, Mr. Justice Brewer, in delivering the opinion for the majority of the court, said: "The placer tract was a small one of fifty-six acres. The tunnel ran 400 feet underneath its surface. At its mouth there was a large dump of earth taken from it. No one had a right to enter that ground as placer-mining ground, unless he had made such an inspection as to enable him to make affidavit that it was adapted to such mining. No examination could have been made without disclosing the existence of this tunnel. That was a fact upon the surface, obvious to the most casual inspection. No one could be heard to say that he had examined that ground in order to ascertain that it was suitable for placer mining, and in such examination had not discovered the existence of this tunnel. It was not a little excavation, with a few shovelfuls of dirt at its entrance. The pile of dirt was evidence which no one could ignore that it was a long tunnel, running far into the earth. It was in mining ground, as all this territory was believed to be, and therefore an excavation likely to disclose veins.

"As an applicant for a placer patent was chargeable with notice of the existence of the tunnel, so also was he chargeable with notice of whatever a casual inspection of that tunnel would disclose. He would not be heard to say: 'I did not enter and examine this tunnel, and therefore knew nothing

of the veins apparent in it.' The government does not permit a person to thus shut his eyes and buy. If there be a vein or lode within the ground, it is entitled to double price per acre for it and the adjacent fifty feet; and, with such interest in the price to be paid, it rightfully holds an applicant for a placer patent chargeable with all that would be disclosed by a casual inspection of the surface of the ground, or of such a tunnel. The applicant must be adjudged to have known that which others knew, and which he would have ascertained if he had discharged fairly his duty to the government." But Mr. Justice Field, in the dissenting opinion, says: "It [the tunnel] extended 400 feet, but it disclosed within it only veins of decomposed porphyry and manganese iron. * * * There was no vein or lode of gold or silver bearing rock found in the tunnel, and there is an erroneous impression conveyed by the court [in the majority opinion] in that respect." Proceeding, Justice Field says: "But, as I shall show hereafter, the mere indication or presence of gold or silver is not sufficient to establish the existence of a lode. The mineral must exist in such quantities as to justify expenditure of money for the development of the mine and the extraction of the mineral. It would create surprise among miners to be told that if a trace of loose gold, such as is shown here, was found at any one spot in a tunnel leading to a placer claim, it would establish the existence of a vein or lode in the placer claim, and form the basis of a proceeding to despoil a purchaser from the patentee, years after the purchase, of a larger portion of its mining property. * * * An unlocated lode claim, existing only in the impressions and beliefs of neighbors or others, and not in the knowledge founded upon discovery and exploration, does not seem to me to have any element of property or validity, or a basis of defense to proceedings to obtain a patent from the government." As we have said, there were indications of veins in the Black placer at the time of the application for its

patent. It is true that what appeared to be veins had been exposed between walls of granite in the bedrock. But not a particle of competent or sufficient evidence was offered by respondents (on whom rested the burden of proof) to establish the fact that these veins had been clearly ascertained, or contained minerals sufficient as to value, quantity, or character to justify exploitation. Even by respondents' own witnesses these quartz-filled crevices in the granite bedrock of the Black placer (that witnesses designated them positively as veins or lodes, as we have shown, was not sufficient evidence of the facts that they were) had never been explored, or even examined, with a view to prospecting, or working them during the placer-mining period. They were encountered just as strata seams and quartz-filled crevices were usually encountered at the surface and on bedrock in working other placer mines in that vicinity. No serious attempt had been made to prospect or exploit them. A witness who sunk on some of them says "they played out." Another witness dissuaded his partner from locating one of them, which he designates as the "main vein," by suggesting that they had already a hundred locations too many. His partner, this witness says, regarded this vein at the time as a "favorable prospect." Hirbour, the locator of the Leo quartz lode, may possibly have sunk a shaft for a few feet on one of these so-called "traceable veins," but he found practically nothing. He says he took out a few pounds of ore. Largey struck what he calls a "blind lead" in his quartz lode claim, the Montana Central, which was located after the application for the placer patent. He says that at the point where he made his discovery of a blind lead the croppings (which extended from said point into the Black placer ground) were detached from the vein he found, and were only float. He states also that he sunk shafts within the Black placer on these so-called veins or leads, but did not even find as a result any vein with well-defined walls. Largey may have been

an interested witness, but the respondents put him upon the stand as their own witness, and we cannot find any testimony in the record which substantially contradicts his statements. The fact, of itself, that Largey and the owners of the Black placer were to exchange interests in their grounds by way of compromise, is not competent evidence to establish the value of the Montana Central quartz lode vein for exploitation at the date of the application for the placer patent. At the time of the application for patent, so far as the testimony for respondents shows, the extent and definite character of the quartz in these crevices in the Black placer were unknown. No assays had been made of the quartz found on bedrock or elsewhere. The ground itself had been worked as a placer mine for years, and, according to all the witnesses who testified on the subject of the value of the quartz therein, was considered valuable for placer mining only. That quartz ore of value was found in the Blue Dick discovery shaft cannot avail respondents. The location of the Blue Dick was made some eight years after the application for the Black placer patent. However, no great amount of work (so far as the record discloses) had ever been performed in exploiting the Blue Dick vein.

There was little evidence to show the value or extent of this vein. At the time of the trial of this suit in the lower court its discovery shaft was half full of water. Two of its locators had dwellings and outhouses on the ground before they made the location, and they were conducting a wood business on the premises at the time of the location. One of them had entered into possession of the premises in dispute under a deed from one Upton, who apparently had some kind of a possessory right to the ground. In 1888 one of the respondent defendants received two deeds from these locators, one of which conveyed to him a certain part of the property in dispute (described with reference to the surface area), on which there was a dwelling house, and the

other an interest in the Blue Dick. This evidence was insufficient to present a question of fact for the jury under the law applicable.

We reiterate the rule as laid down, after a careful review of the authorities, in *Brownfield* v. *Bier,* 15 Mont. 403, 39 Pac. 461, that to meet the designation "known" veins or lodes mentioned in section 2333, Rev. St. U. S., veins or lodes within the boundaries of a placer claim at the time of the application for a patent therefor, which should be excepted from a patent issued thereon, must, at the time of the said application, have been clearly ascertained, and must have been of such an extent, character, and value as to justify their exploitation. Conceding everything as proven which can in any possible view of the evidence be regarded as advantageous to respondents, we are still of opinion that they clearly failed to make out their case. It follows that the special findings of the jury did not justify the general verdict and judgment. There was hardly any temptation to Black, when he applied for a patent, to perpetrate a fraud on the government. By paying $10 more for the four-acre placer, he could have had any quartz leads thereon specifically conveyed to him. Mr. Justice Field, stating the law as to presumptions in favor of government patents, says, in his dissenting opinion in the *Mike & Starr M. Co. Case, supra:* "The presumption in favor of its validity attends the placer patent, as it does all patents of the government of any interest in the public lands which they purport to convey. So potential and efficacious is such presumption that it has been frequently held by this court that if, under any circumstances in the case, the patent might have been rightfully issued, it will be presumed, as against any collateral attack, that such circumstances exist. *Smelting Co.* v. *Kemp,* 104 U. S. 636, 646. As was said by the circuit court in the *Eureka Con. M. Co. Case,* 4 Sawy. 302, Fed. Cas. No. 4,548, a patent for a mining claim is iron-clad in its potency against

all mere speculative inferences." The tendency of the later decisions of the federal courts is to uphold the presumptions in favor of placer and town-site patents more carefully than appears to have been done in some of the earlier decisions of those courts in conflicts between such patents and subsequently located quartz lodes. This is particularly noticeable in the late case of *Dower* v. *Richards,* 151 U. S. 658, 14 Sup. Ct. 452. Perhaps one reason for this is the fact that it has not infrequently happened, in cases involving such conflicts, where the ground in dispute lies within an inhabited portion of a town or city, that the courts have been appealed to and compelled to determine them under the rules of law governing mineral locations, while underlying the apparent issue the real source of controversy was the desire to acquire title to land only nominally valuable for mining purposes. Whether this is true or not, however, in all such cases where persons locate a quartz lode within a placer claim which lies in a town or city, or in a town site, subsequent to the application for a patent to the one or the other, the evidence as to the existing known lead justifying a decision in favor of the quartz lode claimants should be clear and convincing, and not made up of surmise or mere personal impressions and beliefs. Were this not true, honestly acquired town-lot titles in populous mining towns and cities, based on such patents, would be constantly in jeopardy, and subject to possible attack at any time when, in the digging of a cellar or the foundation for a house, a vein of quartz should be disclosed. The upsetting of vested rights to such realty, years after the patents under which they have been acquired were applied for, should never be encouraged or tolerated when based on frivolous or insufficient grounds. In the enactment of the mineral laws congress never contemplated any such result.

Respondents pleaded the statute of limitations as against plaintiffs, but, inasmuch as they have themselves abandoned

this phase of the case, we need not discuss it. Numerous other errors are assigned, particularly in reference to the instructions given by the lower court. But these also it is unnecessary to pass upon. The judgment is reversed, and the cause remanded, with directions to the district court to grant a new trial.

Reversed and remanded.

HUNT, J., concurs. PEMBERTON, C. J., not sitting.

THE UNITED COAL CO. ET AL. v. THE CANON CITY COAL CO. ET AL.

(24 Colorado 116; 48 Pac. 1045. Supreme Court. May 3, 1897.)

[1]**The lessor and lessee of a coal mine may join** as plaintiffs in an action for injunction and accounting against a trespasser on the property who has wrongfully taken and is taking coal therefrom.

Proper co-defendants. Under a complaint alleging that a coal company, operating an adjoining mining property, had extended its operations into the plaintiff's premises, and that another company was working as the agent of the coal company, in an action for an injunction and an accounting, both companies were proper parties defendant.

[2]**Equity jurisdiction covers whole case.** A court of equity having acquired jurisdiction of a matter for one purpose, may determine the rights of the parties before it for all purposes.

Test of proper tribunal. The question of whether an issue of fact should be tried by a jury or by the court is not to be determined by the nature of the issue, but by the character of the action in which such issue is joined.

[3]**Measure of damage.** In case of willful trespass in the mining of coal, the measure of damages is the value of the coal mined at the time and place of its severance from the realty. If the trespass was not willful but innocent in character, it is that value, less the amount which the trespasser by his labor and expense had added thereto.

Error to District Court, Fremont County.

[1]Trespass maintained by husband while title stood in his wife's name. *Sunnyside Co.* v. *Reitz*, 14 Ind. App. 478; 39 N. E. 541; 43 N. E. 46.

As against a party claiming no title, acts of possession are proof of title. *Wakeman* v. *Norton*, 18 M. R. 698.

Joint action against two; plaintiff may recover for several trespasses of one. *Howard* v. *Dayton Co.* 94 Ga. 416; 20 S. E. 336.

Lessee cannot recover for stone quarried and carried away by a trespasser. *Baker* v. *Hart*, 123 N. Y. 470; 25 N. E. 948.

[2]*Lord* v. *Carbon Co.* 15 M. R. 695.

[3]*Donovan* v. *Cons. Coal Co.* 187 Ill. 28; 21 M. R.—.

Action by the Cañon City Coal Company and Harriet Ripley against the United Coal Company and the Western Coal Machinery Company. Judgment for plaintiffs, and defendants bring error. Affirmed.

Defendants in error, as plaintiffs below, allege in their complaint that they are the owners of certain coal lands situate in Fremont county, state of Colorado. A part of these lands were owned jointly by plaintiffs, and a part by the plaintiff Harriet Ripley alone; but at the time of the wrongs recited all were under lease to the Cañon City Coal Company, the lease giving the coal company the exclusive right, for a term of 99 years, to mine the coal from all the lands, and to sell and dispose of the same when mined. The complaint further alleges that the defendant companies entered upon said lands by means of a shaft, known as the "Prentiss Shaft," sunk on lands adjoining, and by underground drifts extracted from the lands of plaintiffs a large amount of coal, and appropriated the same to their own use. It is alleged that the Western Coal Machinery Company, defendant, was mining the coal, under a contract with and for the United Coal Company, for an agreed price per ton.

It is further alleged that there are no shafts or other openings on plaintiffs' lands connecting with the coal deposits therein, which were being worked by the defendants, and that there is no entry thereto except through the shaft, tunnels, and entries of the defendants. It is also alleged that the defendants have been, and were, at the time of the institution of the action, removing props, pillars, timbers, and machinery from its entries and tunnels, for the purpose of permitting and causing the same to fall in and close up, so as to prevent discoveries of the trespasses committed by them upon the coal deposits in plaintiffs' land, and that the prevention of the discovery of such trespasses would be a great and irreparable injury to plaintiffs. It is further

alleged that the defendants have not filed any map or plat of their excavations and workings, as required by the statute in such case made and provided, and that the acts and trespasses of the defendants will cause the plaintiffs irreparable injury unless restrained by the court. Plaintiffs pray that a temporary writ of injunction may issue, restraining and forbidding the defendants, their agents, employes, and attorneys, from going upon and into the lands of plaintiffs, and from mining therein; also from taking or removing any coal therefrom, or props, pillars, timbers, or other supports from the entries or rooms that lead or furnish ingress to any workings in the lands of plaintiffs; and also from doing any act whatsoever which will cause the entries, tunnels, or rooms aforesaid to close up, and from removing any machinery or doing any act which will prevent an entrance to and into said lands of plaintiffs through the shaft of defendants,—and that an order be made for an inspection and survey, by some suitable person or persons, of all excavations which have been made by the defendants, or by either of them, in the lands of plaintiffs. An accounting is also asked of the coal mined and taken from plaintiffs' lands, and that the value of the coal so taken be paid into court, subject to apportionment between the plaintiffs as their rights may appear, and for such other and further relief as may appear to be meet and proper in the premises.

To this complaint the defendants separately demurred, and, upon these demurrers being overruled by the court, separate answers were filed. In these answers the incorporation of the defendant companies is admitted, and the ownership of the plaintiffs, as alleged in the complaint. All other allegations are denied. Upon these issues the cause was tried to the court without the intervention of a jury. The trial resulted in the following findings:

"Now, on this day, this cause coming on again for final judgment upon the proofs heretofore herein taken, and upon

the arguments of counsel for the respective parties already submitted, and the court, being now well and fully advised, doth find generally the issues herein joined in favor of the plaintiff the Cañon City Coal Company, and against the defendants, the United Coal Company and the Western Coal Machinery Company, and specially as follows:

"1. That the trespass complained of against both said defendants, and by both of them committed, was so committed by them in a willful and grossly and culpably negligent manner.

"2. That plaintiff the Cañon City Coal Company, owing to the character of this suit and absence of averment in the pleadings for any other damages, may recover herein only as for an accounting for the coal actually taken out of its lands and disposed of by defendants, and not for damages done to the ground because of coal, if any, left remaining, in pillars or otherwise, which cannot hereafter be made available, or for damages, if any, done to said lands for any other cause.

"3. That the amount of coal actually taken out and disposed of by both defendants from plaintiffs' land was and is thirteen thousand six hundred (13,600) tons, of twenty-four hundred (2,400) pounds to the ton, being a miner's ton, or a total of sixteen thousand three hundred and twenty (16,320) tons, of two thousand (2,000) pounds to the ton, being a commercial ton.

"4. That the total amount so taken out and disposed of, fifteen hundred (1,500) tons of twenty-four hundred (2,400) pounds to the ton, or eighteen hundred (1,800) tons of two thousand (2,000) pounds to the ton, were extracts taken out and disposed of by the defendant the United Coal Company alone, and before the other defendant, the Western Coal Machinery Company, had any connection with said property.

"5. That the total amount of coal so as aforesaid taken out and disposed of by the defendant the Western Coal

Machinery Company, under its contract with the defendant the United Coal Company, extracted, took out, and disposed of twelve thousand one hundred (12,100) miner's tons, or fourteen thousand five hundred and twenty (14,520) commercial tons.

"6. The value of said coal at the collar of the shaft is stipulated to have been two dollars and five cents ($2.05) per commercial ton. The measure of damages in this case is the value of the coal at the collar of the shaft, two dollars and five cents ($2.05) per commercial ton, less the cost, twelve cents per ton, of transporting said coal from the point in the mine where broken to the collar of the shaft, making the measure of the damage one dollar and ninety-three cents ($1.93) per commercial ton for each ton extracted, taken out, and disposed of by defendants.

"7. That a reduction of twenty (20) per cent on the value of said coal per commercial ton shall be allowed for loss.

"8. That because of the contractual relations existing between the two defendant companies, under which the defendant the Western Coal Machinery Company extract coal for the defendant the United Coal Company paying the latter a royalty upon each ton so extracted, and in view of the beneficial interest of the United Coal Company in the coal actually extracted under said contract, there was and is such privity of interest between said defendant companies that it became and was the duty of the United Coal Company to know from what lands the Western Coal Machinery Company was taking the coal delivered to it, the United Coal Company, and that, under all the facts and circumstances as disclosed by the evidence in this case, the said United Coal Company is jointly liable with it for the said trespass of the Western Coal Machinery Company.

"9. The United Coal Company individually owes the plaintiff the Cañon City Coal Company for eighteen hundred (1,800) commercial tons of coal at one dollar and ninety-

three cents ($1.93) per ton, less twenty (20) per cent for loss, or a sum total of two thousand seven hundred and seventy-nine dollars and twenty cents ($2,779,20).

"10. The defendant companies, to wit, the United Coal Company and the Western Coal Machinery Company, are jointly liable to and owe the plaintiff the Cañon City Coal Company for fourteen thousand five hundred (14,500) commercial tons of coal, at one dollar and ninety-three cents ($1.93) per ton, less twenty (20) per cent thereof as loss, or a sum total of twenty-two thousand four hundred and eighteen dollars and eighty eight cents ($22,418.88)."

A decree having been entered in accordance with these findings, the defendants bring the case here by writ of error.

E. W. WAYBRIGHT, J. T. MCDUFFIE and D. C. BEAMAN, for plaintiffs in error.

CHARLES E. GAST, for defendants in error.

HAYT, C. J. It is contended that the Cañon City Coal Company and Harriet Ripley were improperly joined as plaintiffs. The argument in support of this contention proceeds upon the theory that the lessor in an action at law is confined to a suit for the injury to the reversion, and the lessee for the injury to the possession. This is undoubtedly true under strict common-law rules, but this is not a common-law action. Here the principal relief sought is equitable in character, and the accounting is merely incidental thereto. Mrs. Ripley was properly joined as plaintiff, as she, with her co-plaintiff, was the owner of the estate which the defendants were despoiling. Her property was being damaged, and she was entitled to have the injunctive aid of the court extended for its protection. Furthermore, as by the terms of her lease to the Cañon City Coal Company she was to receive as rental therefor certain royalties upon every ton of coal

mined from the land, she was a party in interest in the determination of the amount of coal illegally extracted therefrom by the defendants, and for this reason was a proper party plaintiff in the action. Civ. Code, § 10. Aside from this, the defendants were in no way injuriously affected by the action of the court in refusing to sustain their demurrers upon the ground of a misjoinder of parties plaintiff, the decree, in so far as it affects the defendants, being in no way enlarged by reason of Mrs. Ripley's connection with the suit.

It is also urged that there is an improper joinder of defendants. In support of this assignment of error the fact is urged that the district court rendered a single judgment against the United Coal Company for the coal mined prior to a certain date, and a joint judgment against both the defendants for the coal mined after such date. The complaint alleges that the United Coal Company was operating an adjoining property under a lease, and had extended its operations underground into the plaintiff's premises, and that the machinery company was doing the work as the agent of the coal company, the exact relations between the two not being known to plaintiffs. By a familiar principle of code practice, the rights of all parties to a controversy should be adjusted by a single decree, and full relief be granted in a single suit, if justice to all can be effectuated. The complaint alleges, and the evidence shows, that the injuries suffered by the plaintiffs were the result of wrongs committed by the defendants jointly, and that, unless restrained, the defendants would work great and irreparable injury to the estate, and prevent a full disclosure of the wrongs theretofore inflicted.

Upon these facts equity had jurisdiction to restrain the defendants from the further spoliation of plaintiffs' property, and it was proper to join all persons who were interested in the subject-matter of the suit, to the end that their several rights and duties might be determined in one decree; and, as incidental thereto, courts of equity have full power to grant

such relief as the particular equities of the case may warrant. Relief may be granted to some of the plaintiffs against all the defendants, or in favor of the plaintiffs against one or more defendants; and the decree may adjust the rights of plaintiffs and the rights of defendants as between themselves as justice may require. As we shall hereafter see, the court, having obtained jurisdiction for one purpose, had jurisdiction for the purpose of settling all the rights of the parties plaintiff and defendant; hence the demurrer on account of misjoinder of defendants was properly overruled. 1 Pom. Eq. Jur. § 114; *Danielson* v. *Gude,* 11 Colo. 87, 17 Pac. 283; *Plant* v. *Stott,* 21 Law T. (N. S.) 106; Morr. Min. Digest 141.

The defendants, upon the issues joined, were not entitled to a jury trial. In the case of *Danielson* v. *Gude, supra,* it is said: "The question whether an issue of fact can be tried by a jury or by the court is not to be determined from the nature of the issue, but from the character of the action in which such issue is joined." As we have seen, this is an equitable action, and the mode of trial must be as equitable cases are tried, viz., by the court without a jury, subject, only, to the power of the court to call a jury to answer disputed questions of fact. *Tabor* v. *Sullivan,* 12 Colo. 136, 20 Pac. 437.

We are also of the opinion that the district court applied a correct measure of damages. The defendants being willful trespassers, it was proper to allow the full value of the coal mined, without deduction for their labor and expense in mining the same; the rule of damages being the value of the ore at the time and place it is severed from the realty. If the court had found that the trespass of the defendants was innocent in character, the rule would have been the value at the time of the conversion less the amount which the defendants by their labor had added to that value. *Omaha R. Co.* v. *Tabor,* 13 Colo. 41, 21 Pac. 925; *Woodenware Co.* v. *U. S.* 106 U. S. 432, 1 Sup. Ct. 398.

In this case the value of the coal at the collar of the shaft

is stipulated to have been $2.05 per ton. By deducting from this amount the cost of transporting the coal from the point in the mine where broken to the collar of the shaft, viz., 12 cents per ton, leaves the actual damage $1.93 per ton, as found by the district court.

It is contended that the evidence does not warrant the conclusion that the trespass was willful. It is in evidence that the officers of the company caused an underground survey of these workings to be made in the spring of 1892, before the trespasses complained of were committed. Such survey certainly must have disclosed the location of the workings, although the company never communicated the result to its superintendent in charge of the work. The witness Prentiss testifies that he took charge of the property in the spring of 1892 for the United Coal Company, and that the work had then crossed the boundary line between the Prentiss land and that of plaintiffs, and adds: "I then ordered the entry turned back to the Prentiss land." The evidence shows that, if such order was ever given, it was disregarded, as the defendants continued in the direction in which they had theretofore been working without any change in direction whatever. The witness Theodore Coster testifies that he was foreman for the Prentiss mine during the year 1893, assuming the duties of the position on January 9th, and continued the work until the injunction issued in this case was served. He says that an underground survey was made in November, 1892, and that, after he became aware that he was working on plaintiffs' land, he was given orders from the machinery company to make the openings therein larger, which he proceeded to do until stopped by the injunction issued in this case. This witness also testifies that the effect of making the excavations larger would have been to cave in that portion of the mine, and that an examination would thereby have been rendered impossible. During the time that these excavations were being enlarged, the plaintiffs demanded admittance for the

purpose of making a survey, but were put off upon one pretext and another until about the time the injunction was served. There is other testimony in the record corroborative of this testimony, and the court was amply justified in finding that the trespass was willful. Finding no error in the record, the judgment of the district court will be affirmed.

Affirmed.

BERTHA SCHULTZ ET AL. v. NOYES B. ALLYN.

(48 Pacific 960. Supreme Court of Arizona. May 5, 1897.)

Citizenship to be proved. In a suit supporting an adverse claim plaintiffs must allege and prove that they are citizens of the United States, or have declared their intention to become such.

In such action plaintiff must establish a right in himself, good not only as against defendant, but as against the United States.

[1]**Estoppel by pointing out boundaries.** A mine owner, who points out to an intending purchaser of the adjoining claim certain monuments as indicating the dividing line, estops himself and his subsequent grantees from denying the truth of such representations after the other party, in reliance thereon, has purchased the adjoining claim.

Appeal from District Court Pinal county; Owen T. Rouse, Judge.

Action by Bertha Schultz and others against Noyes B. Allyn, under Rev. St. U. S. § 2326, to determine adverse

[1]Recital in deed of grantee's intention to divert water no estoppel against grantor claiming the water. *Zimmler* v. *San Luis Co.* 57 Cal. 221.

Instance of facts under which party was held not estopped by failure to assert paramount title to land concerning which he dealt with others. *Thompsons' App.* 126 Pa. 367; 17 Atl. 643.

After a conveyance of a part of a claim and sundry relocations, an overlap in conflict existed: *Held*, that the deed estopped the defendant from claiming the ground as a cross lode. *Stinchfield* v. *Gillis*, 17 M. R. 497.

Allowing expenditures. *Pittsburgh Co.* v. *Lake Superior Co.* 118 Mich. 109; 76 N. W. 395.

Owner of mill site acting as employe in locating ditch, diverting his water and allowing expenses, estopped. *Southern Co.* v. *Darnell*, 94 Ga. 231; 21 S. E. 531.

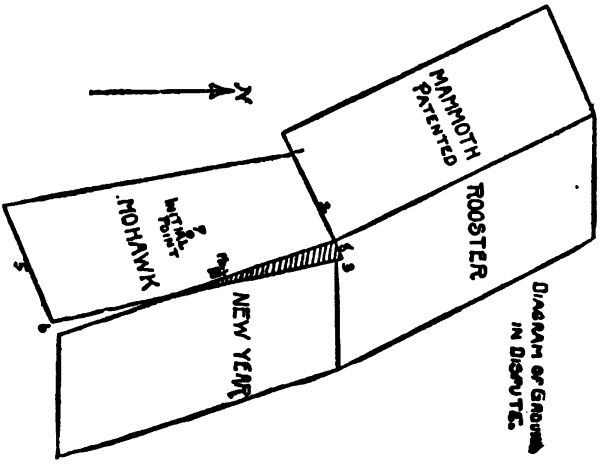
Locators allowing a corporation to take their claim for stock: *Held*, estopped to deny that title passed though no deed had been made. *Murray Hill Co.* v. *Havenor*, 24 Utah 73; 21 M. R.—.

Estoppel against grantors, locators or other parties in interest, to impeach their own title. See *Lowry* v. *Silver City Co.* 179 U. S. 196. *McCarthy* v. *Speed*, 12 So. Dak. 7; 80 N. W. 135. *Bunker Hill Co.* v. *Pascoe*, 24 Utah 60; 66 Pac. 574; 21 M. R.—and notes.

claims to part of a mining claim. From a judgment for plaintiffs, defendant appeals. Reversed.

On the 18th day of March, 1895, Noyes B. Allyn made application before the United States land office at Tucson for a patent for the Mohawk mining claim, situated in Pinal county, Ariz. Within the time allowed by law, the appellees filed in the land office their adverse claim to a portion of the ground, asserting it to be a part of the New Year mining claim, which was owned by them. This action was brought by appellees under section 2326, Rev. St. U. S., to determine their rights to the ground in conflict. The case was tried before the court below without a jury. The judgment was in favor of the plaintiffs (appellees), and the defendant (appellant), has sought this appeal.

The following diagram will show the relative positions of the Mohawk and New Year claims, and the ground in controversy:



NOTE.—The shaded triangular strip between the Mohawk and New Year is the ground in dispute in this action. It is 94 5-10 feet wide at its base on the north, and is 1,100 feet long.

The Mohawk claim was located on December 7, 1881, by the plaintiff Frank Schultz and one R. C. Wood. It is under this location that defendant, Allyn, claims title. The New Year claim was located on January 1, 1885, by plaintiff Frank Schultz. It is under this location that all the plaintiffs claim title. Frank Schultz sold a one-fourth interest in the Mohawk to plaintiff Bauer in September, 1882, and his remaining interest to one Eugene W. Aram on July 31, 1882. Since 1882 he has had no further interest in the Mohawk mine. Wood, the other locator, conveyed all his interest to one Lee H. Newton on January 15, 1883, since which time he has had no interest therein, and since which time he has never been on the ground. In September, 1884, Newton conveyed his one-half interest in the Mohawk claim to Andrew Damm and James G. Fraser. So that in September, 1884, Damm, Fraser, and John Bauer were the owners of the Mohawk claim. In 1884,—about the time that Damm and Fraser purchased their interest,—the plaintiff Schultz went onto the Mohawk claim with them, and pointed out to them its monuments. The monuments he then pointed out are the same as shown by figures 1, 2, 3, 4, 5, and 6, on the foregoing diagram. Schultz then explained to both Damm and Fraser that he believed the ledge swung around to the west, and for that reason he had placed the monuments of the Mohawk in that particular position. About three months after Schultz had pointed out and designated to Damm and Fraser where the monuments of the Mohawk claim were, and the boundaries of the claim had been agreed upon between them, he (Schultz) located the New Year mine. Prior thereto the ground covered by the New Year claim was unappropriated public land, and it was unappropriated when Schultz pointed out the monuments of the Mohawk in 1884. The location notice of the New Year bears date January 1, 1885. It describes the claim as joining the Mohawk on the

east. Later in the year 1885, Damm, Fraser, and Bauer, as owners of the Mohawk claim, had a survey made of the same by Gustavus Cox, a United States mineral surveyor. This surveyor erected regular mineral monuments at the points where the old monuments were. Each of these monuments consisted of a post 4 by 4 inches and 4 feet high, surrounded by a mound of stones. Cox also made a survey and map of the adjoining claims at the time. It shows the Mohawk mine to be situated and located as now claimed by defendant Allyn. The monuments so erected by Cox, Damm, and Fraser have remained there ever since. They have been known to every one as marking the boundaries of the Mohawk claim. Andy Collins, Martin Derrig, Thomas L. Bailey, Damm, Fraser, and many other witnesses testified that those monuments of posts and stones were known all around that neighborhood as the Mohawk monuments. In 1890, Thomas Armstrong a mining engineer, was employed by the Mohawk Mining Company to make a contour map of all the claims belonging to that company, and of the adjoining claims. In making this survey, in 1890, he met plaintiff Schultz on the Mohawk mine. Schultz then pointed out to Armstrong the monuments of the Mohawk, and Armstrong made a survey of the claim from the monuments as pointed out by Schultz. The monuments so pointed out by Schultz at that time were the identical monuments which Cox, Damm, and Fraser had erected in 1885. A few weeks later, and about August, 1890, Armstrong made a map from the surveys he then made, which map shows all the mines of the Mohawk Mining Company. It also shows the Mohawk and the New Year claims, as surveyed by him from the monuments so pointed out by Schultz. This map is in the records of this case, and shows the location of the Mohawk to be as claimed by defendant, Allyn. In January, 1892, the defendant, Allyn, procured from the plaintiffs Susana and John Bauer, an option to purchase their interest in the Mo-

hawk claim, and also the interest of their co-owners Damm, Fraser and Stephens. The purchase price was to be $25,000. At or about the time of the execution of this agreement, the said Bauer, Damm, Fraser, and Allyn, and also Thomas L. Bailey, who was agent for Mr. Allyn, met at Tucson, and had an extensive conversation about the Mohawk claim and its monuments and boundaries. At this meeting a sketch map was drawn, which showed the location of the Mohawk claim relative to the Mammoth and New Year. This sketch showed the Mohawk to be located in the same manner as did the map of Cox and of Armstrong, and it showed that the ground in dispute in this action was included within the limits of the Mohawk mine. The plaintiffs Susana and John Bauer impressed on Mr. Allyn that this was a fact, and that the sketch correctly outlined the position and boundaries of the Mohawk mine. It was further agreed at the same time that Damm should take defendant, Allyn, and Mr. Bailey out to the Mohawk ground, and show them the mine, and the monuments of the claim. And both the Bauers and Fraser assured Mr. Allyn that they would stand by, and indorse as correct everything that Damm showed him. This is not denied by the plaintiffs in the case. Accordingly, in January, 1892, Damm, as the representative and agent of all his co-owners, and particularly Susana and John Bauer, went out to the Mohawk claim with Allyn and Bailey. He took them around the claim, and pointed out to them each of the corner and center end monuments. These monuments were at the points marked 1, 2, 3, 4, 5, and 6, on the diagram herein. They were the same post monuments which had been erected in 1885, and were at the same places where Schultz had, in 1884, pointed out the original Mohawk monuments to Damm and Fraser. The boundaries of the Mohawk mine as then designated and shown by Damm to Allyn and Bailey were the same as were described in the map of Cox and in the map of Armstrong,

and now claimed by Allyn. Mr. Allyn then took possession of the Mohawk claim, under his option to purchase, and put Thomas L. Bailey in charge of it, and had him do development work thereon from that time on until July 15, 1892, when he bought the mine. While Bailey was thus in charge of the mine, doing work thereon, to wit, on June 11, 1892, and while Andrew Damm was also at the mine with him, Frank Schultz came on the ground and took dinner with him. As he had been one of the original locators of the Mohawk claim, and as he was the sole locator of the New Year claim, and was then an owner thereof, Mr. Bailey requested him to show him the monuments of the Mohawk and the dividing line between the Mohawk and the New Year. Schultz complied with this request. He took Bailey around the Mohawk claim and pointed out to him each of the corner and center end monuments of the Mohawk claim. He pointed out to Bailey the identical 4 by 4 post monuments which Cox, Damm, and Fraser had erected in 1885, and he (Schultz) told Bailey that those were the true and correct corner and center end monuments of the Mohawk claim. Mr. Bailey communicated these facts to Mr. Allyn. Bailey and Schultz then went to work to ascertain and determine the boundary line between the Mohawk and the New Year. Schultz posted himself at the southeast corner of the Mohawk claim (figure 6 on the foregoing diagram) from which point he could distinctly see the northeast corner monument of the Mohawk (figure 3 on the diagram). Bailey started from this southeast monument, carrying with him an ocatillo stick with a rag tied at the end of it for a flag. He proceeded in the direction of the northeast monument. When about midway between the two monuments he stopped and faced Schultz, who remained at the southeast monument. Schultz motioned with his hat from one side to another until Bailey was in a direct line between the two monuments. Then Bailey stuck his stick in the ground, and built a small monument of stones around it. Schultz came up, and it was agreed

by him that this monument and the line sighted from the southeast and northeast monuments of the Mohawk was the correct boundary line between the Mohawk and the New Year. The line is the line marked 3, 6, on the foregoing diagram. And so it was agreed that the New Year claim did not take in any of the ground of the Mohawk as bounded by the post monuments which Damm and Fraser had erected in 1885. Thereafter, and on July 15, 1892, Mr. Allyn being satisfied with the value of the Mohawk mine, and relying on the representations made to him and to his agent, Mr. Bailey, by the plaintiffs Susana and John Bauer and Frank Schultz, as to the location of the corner and center end monuments of the Mohawk claim, and believing from their representations that the monuments they had pointed out, and had caused others to point out, to him as being the true monuments of the Mohawk claim, were, as a matter of fact, the true monuments, he paid to the Bauers and their co-owners of the Mohawk $25,000, and they delivered to him their deed. And in this way did defendant, Allyn, buy the land in dispute in this action. Defendant, Allyn, continued extensive development work on the claim after he purchased it; Mr. Bailey remaining as his manager. He erected, at great expense, a boiler and engine house, and placed therein a valuable boiler and engine, and he also erected a large stamp mill, at about 40 or 50 feet from the boundary line between the Mohawk and New Year, as such boundary line was settled and agreed upon by Schultz and Bailey. The ground in dispute is valuable to defendant, Allyn, for the use of this mill and machinery. The point where this mill is situated is shown in the foregoing diagram. The lower court rendered its judgment that the ground in dispute was part of the New Year claim, that of said claim Susana Bauer was the sole owner of an undivided five-eighths interest thereof, and that her said title to the ground in dispute be forever quieted as against the claim of defendant Allyn. Plaintiff introduced

in evidence the deraignment of title of the New Year claim. This evidence showed that Frank Schultz was the owner of an undivided one-half interest therein, and that Bertha Schultz was the owner of the other half interest. It further showed that Susana Bauer did not have, and never did have, any interest in the New Year claim. The deraignment of title consists of: (1) Notice of location of New Year mine by Frank Schultz, on January 1, 1885. (2) Deed from Frank Schultz to Bertha Schultz of a one-half interest in the New Year mine, dated January 7, 1893. (3) Notice and affidavit of forfeiture of John Haynes for non-performance of assessment work in 1893, the affidavit being made by Bertha Schultz. That is all the evidence produced on the trial to show that Susana Bauer is the owner of a three-eighths interest in the New Year mine. There is no evidence in the case that plaintiffs are citizens of the United States, or have declared their intention to become such. There is no such averment in their complaint. Judgment was rendered that plaintiff Bertha Schultz was the owner of five-eighths, and plaintiff Susana Bauer was the owner of three-eighths, of the New Year mine, and that the land in dispute belonged to them. Defendant filed his motion for a new trial, which was overruled, and he has perfected this appeal.

SELIM M. FRANKLIN, for appellant.

J. S. SNIFFIN, for appellees.

HAWKINS, J. (after stating the facts). There are numerous errors assigned, only a few of which we deem it necessary to notice. The object of this suit, it will be seen from the statement of facts, was to adverse Allyn in the obtaining of a patent to the Mohawk mining claim. The complaint does not allege, nor is it proved, that any of the plaintiffs were

citizens of the United States, or had declared their intention to become such. Defendant claims error in overruling the general demurrer on this account. The complaint prays that plaintiffs' title be quieted, and they (plaintiffs) claim it is not necessary to allege or prove citizenship in such a case. This claim is true in an ordinary action to quiet the title to mining claims between individuals (*Thompson* v. *Spray,* 72 Cal. 528, 14 Pac, 182; *Moritz* v. *Lavelle,* 77 Cal. 12, 18 Pac. 803; *Souter* v. *Maguire,* 78 Cal. 544, 21 Pac. 183), but this is not such a case. The object of this suit (being an adverse) is to quiet the title between these individuals and the United States. It will not do to say that the mere form of the complaint is to govern in this class of cases. Rev. St. U. S. § 2326, does not provide what form of action shall be brought. It may be ejectment, a suit to try the right to real property under the statute, or an action to quiet the title, or the form ordinarily used in adverse actions. Yet when it appears that the object of the suit is to adverse the party applying for a United States patent, it is necessary to both allege and prove that plaintiffs are citizens of the United States, or have declared their intention to become such. *Lee Doon* v. *Tesh* (Cal.) 6 Pac. 97; Id., 8 Pac. 621; *Anthony* v. *Jillson* (Cal.) 23 Pac. 419; *Rosenthal* v. *Ives* (Idaho) 12 Pac. 904. If the complaint fails to allege citizenship, it is bad on demurrer. The demurrer in this case was general, and, the record shows, was formally submitted to the court below, and was overruled. It was not urged by defendant, but an exception was taken. This point should have been called directly to the court below, and urged. Where a point is unquestionably well taken on demurrer, counsel should call the attention of the court to the same, so the court should have an opportunity to give it the proper consideration.

The complaint not alleging citizenship of the plaintiffs, and the evidence not proving the same, would warrant a re-

versal and new trial; but in examining the entire record we have concluded to consider the whole case. The testimony of Wood, an original locator of the Mohawk mining claim, shows that when this claim was located the southerly end of the Mammoth was made the northerly end line of the Mohawk, with monuments the same; yet monuments 1 and 3 were shifted long before any rights acquired under the New Year location, and the location as shown by the diagram was distinctly marked on the ground, and these lines and monuments pointed out by the owners of the New Year to the agent of Allyn; and, Allyn having been induced to purchase the Mohawk by such representations, they (plaintiffs) are estopped from denying the truth of the representations made by them regarding the line between the Mohawk and New Year claims. The rules of law relating to estoppel in pais apply to mining ground the same as any other kind of real estate. *Blake* v. *Thorne* (Ariz.) 16 Pac. 270. The facts show that Schultz pointed out the monuments of the Mohawk claim to Allyn's agent on the boundary line between the Mohawk and the New Year claims, while Schultz was the owner of the New Year; and afterwards he quitclaimed an interest to Bertha Schultz. She, as a privy in the estate, is bound by the same estoppels as her grantor. 7 Am. & Eng. Enc. Law, p. 23, and cases cited in notes; Bigelow, Estop. pp. 607, 608. "A party is estopped to deny the line between his own and the adjoining land to be the true line, if he has sold and conveyed land up to such line, has pointed it out as the true line, and has induced the defendant to purchase up to such line." Herm. Estop. p. 1270, § 1133, and authorities cited. The deraignment of title to the New Year mine fails to show the title as found by the court. Schultz located the mine on January 1, 1885. He quitclaimed a three-eighths interest to his wife, Bertha Schultz, January 4, 1893, and made affidavit of forfeiture of John Haynes for nonrepresentation for 1893. No record title

is shown in either of the Bauers. No judgment should have been entered in their favor. Rev. St. U. S. § 2326, as amended March 3, 1881. In this class of cases, each party is to establish his right to the mining ground in controversy against the United States as well as against his adversary. The party filing the contest should allege and prove every step necessary to establish his right to his mining claim that would be required in the land office for a patent, with the exception of advertisement and certificate of surveyor general as to amount of work required before patent could be obtained. If the proof shows no title, or that all the requirements of the law have not been complied with, he can recover no judgment. Plaintiffs must recover on the strength of their own title, and not on the weakness of that of their adversary. *Gwillim* v. *Donnellan,* 115 U. S. 50, 5 Sup. Ct. R. 1110. There was a location by Schultz, which, on its face, seems valid. Then the other plaintiffs must, before a decree is rendered in their favor, show a title in themselves, based on such location. The proof is wanting in so far as Susana Bauer is concerned. The complaint does not state facts sufficient to constitute a cause of action in an adverse in not alleging the citizenship of the plaintiffs, or their intention to become such. It is nowhere shown in the evidence that plaintiffs are citzens, or had declared their intention to become such. It is shown that plaintiffs John and Susana Bauer sold the strip of land in dispute to Allyn as being a part of the Mohawk claim, and they are estopped from claiming the same ground as a part of the New Year, or any, location, so long as the Mohawk is a valid subsisting claim. The evidence shows that neither of the Bauers ever owned any interest in the New Year claim, and that Frank Schultz represented to Allyn that the monuments of the Mohawk were at the points where defendant claims them to be, and pointed out the boundary line between the Mohawk and New Year claims to the defendant, who purchased rely-

ing on the representations of Schultz. He and Bertha Schultz, his privy in interest, are estopped from denying the truth of such representations. The ground in dispute is a part of the Mohawk claim, and was never included in the New Year location.

The judgment of the lower court is reversed, with directions to enter judgment for the defendant.

BAKER, C. J., and BETHUNE, J., concur.

ENTERPRISE MINING Co. v. RICO-ASPEN CONSOLIDATED MINING Co.

(167 U. S. 108; 17 Sup. Ct. 762. Supreme Court. May 10, 1897.)

[1]Construction of the rights of tunnel sites. The clear import of the language of Rev. Stat. Sec. 2323 is to give to a tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length on that vein; which right arises upon the discovery of the vein in the tunnel; dates by relation back to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.

[2]And is not destroyed or impaired by the failure of the owner of the tunnel to adverse a previous application for a surface patent before the discovery of the vein.

The Colorado territorial statute of 1861, limiting a tunnel owner to 250 feet each way on a vein discovered in the tunnel, if not in terms subsequently repealed, was superseded by the legislation of congress.

Certiorari to the Court of Appeals for the Eighth Circuit.

This case involves the construction of section 2323, Rev. St., which reads as follows:

"Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to

[1]*Calhoun Co.* v. *Ajax Co.* 182 U. S. 499; 21 M. R.—.

Owner of vein cannot tunnel through adjoining patent to reach vein apexing in his own ground. *St. Louis Co.* v. *Montana Co.* 113 Fed. 900.

Failure to work for six months forfeits blind lodes but not the right of way. *Fissure Co.* v. *Old Susan Co.* 22 Utah 438; 21 M. R.—.

[2]A patent on the line of a tunnel is not conclusive against the tunnel that there was a valid discovery upon which to make a location of the patented claim, as the tunnel has never had its day in court to dispute such fact. *Uinta Co.* v. *Creede Co.* 119 Fed. 164.

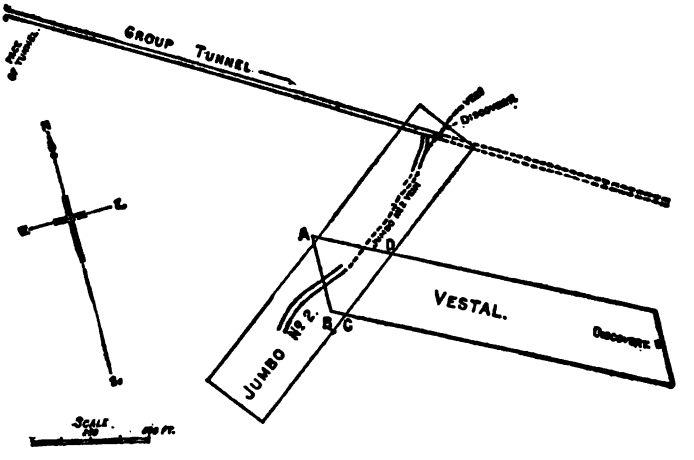
the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel."

The facts are these:

The Group tunnel site, under which the Enterprise Mining Company, the defendant and appellant, claims the right to the ores in controversy, was located on July 25, 1887, and the certificate of location was filed in the office of the county clerk and recorder of the county in which the location was made on August 29, 1887.

The Vestal lode mining claim, under which the plaintiffs (the appellees) claim title, is based upon a discovery made on March 23, 1888. The claim was located on April 1, 1888, and the location certificate was filed for record on April 3, 1888.

The situation of the properties is sufficiently disclosed by the following diagram:



The ore in controversy is within the limits of the tract, A, B, C, D. As to this tract, the two locations, the Vestal and Jumbo No. 2, conflict. The owners of the Vestal claim made application in 1890 for a patent. No adverse proceedings were instituted by the defendant, and a patent for the claim was issued on February 6, 1892. At the time of these proceedings no discovery of a vein in the tunnel had been made. But on June 15, 1892, a vein was discovered 1,920 feet from its portal, at the place marked "Discovery" on the diagram. Immediately thereafter the defendant caused the boundaries of the claim Jumbo No. 2 to be located upon the surface of the earth, and a certificate of location to be duly recorded, in which it claimed 54 feet along the vein to the northeasterly of the tunnel, and 1,446 feet southwesterly. The position of this claim appears sufficiently on the diagram. The portion of this vein within the limits of the Vestal claim is about 750 feet from the line of the tunnel. This suit was commenced in the circuit court of the United States for the District of Colorado, on September 3, 1892, and was decided by that court in favor of the plaintiffs. 53 Fed. 321. On appeal to the court of appeals this decision was reversed (32 U. S. App. 75, 13 C. C. A. 390, and 66 Fed. 200), and the case remanded for further proceedings. Thereupon the case was brought here on a writ of certiorari.

CHARLES H. TOLL, JOEL F. VAILE, HENRY M. TELLER, and EDWARD O. WOLCOTT, for appellant.

R. S. MORRISON, CHARLES J. HUGHES, JR., and CHARLES S. THOMAS, for appellees.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

It will be observed that so far as the mere location of the two claims, Vestal and Jumbo No. 2, the former was prior in

time to the latter, and would, if there were no other facts, give priority of right to the ore within the limits of the conflicting territory. The tunnel was, however, located some eight or nine months before the discovery and location of the Vestal claim, and the statute gives to the owners of such tunnel the right to "all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof, not previously known to exist." By virtue of this section, therefore, the right of the defendant to this vein was prior to that of the plaintiffs to the mineral in their claim. In this respect the circuit court and the court of appeals agreed. The matters now in dispute are the extent of that right and the effect of a failure to "adverse" the application for a patent.

The right to this vein discovered in the tunnel is by the statute declared to be "to the same extent as if discovered from the surface." If discovered from the surface the discoverer might, under Rev. St. § 2320, claim "one thousand five hundred feet in length along the vein or lode." The clear import of the language, then, is to give to the tunnel owner, discovering a vein in the tunnel, a right to appropriate 1,500 feet in length of that vein. When must he indicate the particular 1,500 feet which he desires to claim? Counsel for plaintiffs contend that it should be done when, in the first instance, the tunnel is located, and that, if no specification is then made, the line of the tunnel is to be taken as dividing the extent of the claim to the vein, so that the tunnel owner would be entitled to only 750 feet on either side of the tunnel; while counsel for defendant insists that he need not do so until the actual discovery of the vein in the tunnel. We think the defendant's counsel are right. In order to make a location, there must be a discovery; at least, that is the general rule laid down in the statute. Section 2320 provides: "But no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim

located." The discovery in the tunnel is like a discovery on the surface. Until one is made, there is no right to locate a claim in respect to the vein, and the time to determine where and how it shall be located arises only upon the discovery,—whether such discovery be made on the surface or in the tunnel. The case of *Erhardt* v. *Boaro,* 113 U. S. 527, 5 Sup. Ct. 560, is not in point, for there the preliminary notice, which was made upon a discovery from the surface, simply claimed "1,500 feet on this mineral bearing lode," without further specification as to boundaries or direction; and it was held that that was equivalent to a claim for 750 feet in each direction from the discovery shaft.

It may be true, as counsel claim, that this construction of the statute gives the tunnel excavator some advantages. Surely, it is not strange that congress deemed it wise to offer some inducements for running a tunnel into the side of a mountain. At the same time, it placed specific limitations on the rights which the tunnel owner could acquire. He could acquire no veins which had theretofore been discovered from the surface. His right reached only to "blind veins," as they may be called,—veins not known to exist, and not discovered from the surface before he commenced his tunnel. It required reasonable diligence in the prosecution of his work. It placed a limit in length (3,000 feet) beyond which he might not go in his search for veins, and acquire any rights under his tunnel location, and the veins to which he might acquire any rights were those which the tunnel itself crossed. Such is the import of the letter to which counsel refer, from Commissioner Drummond, of date September 20, 1872. Land Office Report, 1872, p. 60; 3 Copp's Land Owner, 130. It may be also noticed that in this letter the commissioner affirmed the right of location on either side of the tunnel, in these words: "When a lode is struck or discovered for the first time by running a tunnel, the tunnel owners have the

option of recording their claim of fifteen hundred feet all on one side of the point of discovery or intersection, or partly on one and partly upon the other side thereof."

We hold, therefore, that the right to a vein discovered in the tunnel dates, by relation, back to the time of the location of the tunnel site, and also that the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating that claim the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire.

It was well said by the court of appeals in its opinion in this case: "The striking characteristic of this section of the act is that it gives the right to the possession of certain veins or lodes to the diligent owner of a tunnel before his discovery or location of any lode or vein whatever, contingent only upon his subsequent discovery of such veins in his tunnel. Veins or lodes discovered on the surface or exposed by shafts from the surface must be found before any right to them vests (sections 2, 5, Act May 10, 1872; sections 2320, 2324, Rev. St.); but this section declares that the owners of a tunnel, by simply locating and diligently prosecuting it, without the discovery of any vein or lode whatever, 'shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface.'"

In *Hope M. Co.* v. *Brown,* 11 Mont. 370, 383, 28 Pac. 732, 735, the supreme court of that state observed: "But has he (the tunnel owner) not an inchoate right in such veins, which right is kept alive by prosecution of work on the tunnel, according to law? This seems to be implied by the last clause of the statute, that 'failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of the tunnel.' The fact that said nonaction on the part of the tunnel claimant

should constitute an abandonment shows that it was the intent of congress to reserve such lodes from the commencement of the tunnel, while it was prosecuted according to law." See, also, *Back* v. *Mining Co.,* 2 Idaho, 386; 17 Pac. 83.

The plaintiffs further contend that an act passed by the territorial legislature of Colorado in 1861 (Sess. Laws Colo. 1861, p. 166; Mills, Ann. St. § 3141) limits the right of the tunnel owner to veins discovered in the tunnel to 250 feet on each side of the tunnel. That section reads:

"Any person or persons engaged in working a tunnel, within the provisions of this chapter, shall be entitled to two hundred and fifty feet each way from said tunnel, on each lode so discovered."

But, if that section has not been in terms repealed by the legislature of Colorado, it was superseded by the legislation of congress, as found in the Revised Statutes. *Ellet* v. *Campbell,* 18 Colo. 510, 33 Pac. 521.

The remaining question is whether the failure to "adverse" the application for a patent for the Vestal claim destroyed or impaired the rights of the defendant. We think not. Sections 2325 and 2326, Rev. St., contain the legislation in reference to adverse claims. These provisions are substantially that when a party makes his application for a patent, if no adverse claim is filed within 60 days from publication of notice, it shall be assumed that the applicant is entitled to a patent; that, when an adverse claim is filed, it "shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claims, and all proceedings * * * shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable dili-

gence to final judgment; and a failure so to do shall be a waiver of his adverse claim."

Now, at the time the application for patent to the Vestal claim was presented and the proceedings had thereon, the defendant knew of no vein which would enable it to dispute the right of the owners of the Vestal to a patent. The Vestal claim, it will be perceived, runs parallel to the line of the tunnel, and is distant therefrom 500 feet. The presumption, of course, would be that the vein ran lengthwise, and not crosswise, of the claim, as located, and such a vein would not, unless it radically changed its course, cross the line of the tunnel. Whether it did or not, or whether any other vein should be found in the tunnel which would cross the territory of the Vestal, was a matter of pure speculation; and there would be no propriety in mantaining a suit to establish defendants' inchoate right, and delay the Vestal claimants in securing a patent on a mere possibility which might never ripen into a fact. The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible, and certain right, and not a mere possibility. Of course, the owners of the Vestal claim had notice, from the fact of the location of the tunnel line, of the possibilities which future excavations of the tunnel might develop, and so they were not prejudiced by the failure to "adverse." And as the defendant could not in any suit which it might institute, establish a certain adverse right, and as litigation in the courts is based upon facts, and not upon possibilities, it seems to us that nothing was to be gained by instituting adverse proceedings, and therefore nothing lost by a failure so to do.

These are all the questions in the case. We are of the opinion that the decision of the Court of Appeals is right, and it is

Affirmed.

CAMPBELL v. ELLET.

(167 U. S. 116; 17 Sup. Ct. 765. Supreme Court. May 10, 1897.)

[1]**No location of veins discovered needed.** The discovery of a vein in a tunnel, worked according to Rev. Stat. Sec. 2323, gives a right to the possession of the vein to the same extent as if discovered from the surface, and a location on the surface is not essential to a continuance of that right. 33 Pac. 521, affirmed.

A record of such claim in connection with the notice at the mouth of tunnel under the terms of the statute gives title to the vein discovered without staking on surface.

Error to the Supreme Court of the State of Colorado.

On September 18, 1872, George C. Corning and other citizens of the United States located a tunnel site. They diligently prosecuted the work of excavation, expending therein $100,000.

On February 3, 1875, the Corning Tunnel Company, a corporation duly organized, was the owner of this tunnel location by sundry mesne conveyances from the locators thereof; and said tunnel company, while prosecuting the work of excavation, cut and discovered within the tunnel, and upon the line thereof, at a distance of 594 feet from its face, a vein of mineral bearing rock in place, which was named the Bonanza lode; and on said February 3d it posted at the face of the tunnel a plain sign and notice, giving the name of said vein, the point of discovery, within the tunnel, the general course of the vein from the point of discovery, and claiming 750 feet of said vein on each side of the line of the tunnel. This Bonanza lode did not appear upon the surface of the

[1]*Jones* v. *Prospect Co.* 17 M. R. 530.

A vein discovered in tunnel 250 feet below surface may be staked on surface without proving up, although tunnel was not a federal tunnel and had been run through a patent. *Brewster* v. *Shoemaker*, 28 Colo. 176; 21 M. R.—.

ground, and was not known to exist prior to its discovery by the Corning Tunnel Company, as above stated.

On February 9, 1875, the tunnel company filed and caused to be recorded in the office of the clerk and recorder of the county of Boulder a location certificate of said Bonanza lode, giving the name of the lode so discovered, and the company as the locator thereof, the point in the line of the tunnel at which the lode was discovered, and claiming 750 feet of the vein upon each side thereof; also stating the general course of the vein. The location certificate was as follows:

"Territory of Colorado, (County of Boulder.)

"Know all men by these presents, that we, the Corning Tunnel Company, claim, by right of discovery and by right of location, 1,500 feet, linear and horizontal measurement, on the Bonanza lode, along the vein thereof, with all its dips, variations, and angles, together with the amount of surface necessary for working the same, and allowed by law; 750 feet of said lode so located lying and being easterly of the discovery on said lode, and 750 feet being westerly of said discovery, said lode being more particularly described as follows, to wit: Beginning at a point in the Corning tunnel 594 feet from the face of said tunnel, and extending from said point 750 feet easterly and 750 feet westerly. The bearing of said lode is about north 78 degrees east. This lode was discovered in the Corning tunnel, and it is claimed under the provisions of section 4 of an act of congress approved May 10, 1872, in Gold Hill mining district. Said lode was discovered and was located on the 3d day of February, A. D. 1875.

"[Signed] FREDERICK A. SQUIRES, Pres.
"DANIEL A. ROBINSON, Secy."

Subsequently, the title to the tunnel and the lode passed to the defendant in error. After the discovery of said Bonanza lode, the owners of the tunnel continuously and diligently prosecuted the work on the lode, and expended each

year thereon the sum of $100. On July 10, 1886, more than 11 years after the discovery of the Bonanza lode, the plaintiff in error, Campbell, and one Cyrus Taylor, with full knowledge of the tunnel claim, and of the discovery and location of the Bonanza lode aforesaid, made a location of a certain lode, called by them the J. L. Sanderson lode. This location is on the same lode and vein as that described in the Bonanza location, and the discovery cut by which it was discovered by Campbell and Taylor is within 200 feet of the tunnel line. Campbell and Taylor did everything required to be done by the statutes of the United States in discovering and marking the point of discovery of the Sanderson lode, and in marking the boundaries of the claim on the surface of the ground, and thereafter did the requisite annual labor thereon. Having made application for a patent, the defendant in error filed an adverse claim, and commenced a suit, as required by the statute. Rev. St. § 2326. This, after a trial in the district court of Boulder county Colo., was taken to the supreme court of the state, and by that court a judgment was entered in favor of the defendant in error, on the ground that the proceedings in respect to the tunnel, the discovery of the Bonanza lode, and the location thereof, vested in him a title to that lode to the distance of 750 feet from the line of the tunnel (18 Colo. 510, 33 Pac. 521), to reverse which judgment, Campbell sued out this writ of error.

L. C. ROCKWELL, for plaintiff in error.

PLATT ROGERS and JOHN F. SHAFROTH, for defendant in error.

MR. JUSTICE BREWER, after stating the case, delivered the opinion of the court.

In the case just decided, of *Enterprise M. Co.* v. *Rico-Aspen Cons. M. Co.*, 167 U. S. 108, 18 M. R. 661, we have

considered the law in respect to mining tunnels. Beyond what was there disposed of, only a single question requires consideration, and that is does the failure to mark on the surface of the ground the point of discovery and the boundaries of the tract claimed, destroy the right of the tunnel owner to the veins he has discovered in the tunnel?

It will be noticed that the tunnel company posted at the mouth of the tunnel a notice of its discovery of this lode, and the extent of its claim, thereon, and also that it caused to be filed in the office of the recorder of the county a location certificate, as required by the local statute. Mills' Ann. St. §§ 3150, 3151. It will also be perceived that section 2323, Rev. St., gives to the tunnel discoverer the right of possession of the veins. It in terms prescribes no conditions other than discovery. The words "to the same extent" obviously refer to the length along the line of the lode or vein. Such is the natural and ordinary meaning of the words, and there is nothing in the context or in the circumstances to justify a broader and different meaning. Indeed, the conditions surrounding a vein or lode discovered in a tunnel are such as to make against the idea or necessity of a surface location. We do not mean to say that there is any impropriety in such a location, the locator marking the point of discovery on the surface at the summit of a line drawn perpendicularly from the place of discovery in the tunnel, and about that point locating the lines of his claim in accordance with other provisions of the statute. It may be true, as suggested in Morrison's Mining Rights (8th Ed. p. 182), that, before a patent can be secured, there must be a surface location. Rev. St. § 2325. But the patent is not simply a grant of the vein, for, as stated in the section, "a patent for any land claimed and located for valuable deposits may be obtained in the following manner." It must also be noticed that section 2322, in respect to locators, gives them the exclusive right of possession and enjoyment of all the surface within the lines

of their locations, and all veins, lodes, and ledges the tops or apexes of which are inside such lines. So that a location gives to the locator something more than the right to the vein, which is the occasion of the location. But, without determining what would be the rights acquired under a surface location based upon a discovery in a tunnel, it is enough to hold, following the plain language of the statute, that the discovery of the vein in a tunnel, worked according to the provisions of the statute, gives a right to the possession of the vein to the same length as if discovered from the surface, and that a location on the surface is not essential to a continuance of that right. We do not mean to hold that such right of possession can be maintained without compliance with the provisions of the local statutes in reference to the record of the claim, or without posting in some suitable place, conveniently near to the place of discovery, a proper notice of the extent of the claim, —in other words, without any practical location; for in this case notice was posted at the mouth of the tunnel, and no more suitable place can be suggested, and a proper notice was put on record in the office named in the statute.

We are of opinion, therefore, that the question considered must be answered in the negative. There is no error in the judgment of the supreme court of Colorado, and it is

Affirmed.

WINDFALL MANUFACTURING CO. v. WILLARD E. PATTERSON ET AL.

(148 Indiana 414; 47 N. E. 2. Supreme Court. May 12, 1897.)

[1]**A business which is a nuisance per se,** as also one that is so conducted as to become an actual nuisance, will be enjoined; but a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable.

A gas well sunk to supply fuel for a manufacturing plant is not per se a nuisance.

The drilling of a gas well within 152 feet of a dwelling house will not be enjoined on account of the noise, pollution of the air, danger from fire or explosion that would result from operating the well, or on account of water or oil from the well, where it is not shown with certainty that water, oil, or gas will be found, and it is not shown that the gas well could not be operated in such a manner as to avoid the injuries apprehended.

Appeal from Circuit Court, Howard County; L. J. Kirkpatrick, Judge.

Action by Willard E. Patterson and another against the Windfall Manufacturing Company. Judgment for plaintiffs. Defendant appeals. Reversed.

J. C. BLACKLIDGE, C. C. SHIRLEY, R. B. BEAUCHAMP, W. W. MOUNT and W. O. DEAN, for appellant.

M. BELL, W. C. PURDUM, GIFFORD & NASH and GIFFORD & COLEMAN, for appellees.

HOWARD, J. The appellees alleged in their complaint that the appellant was "threatening to and proceeding to drill a

[1]*McGregor* v. *Camden*, 47 W. Va. 193; 20 M. R.—. *Strobel* v. *Kerr Salt Co.* 164 N. Y. 303; 58 N. E. 142.

gas well" within 152 feet of appellees' dwelling, and asked that the appellant be restrained from digging said well and from digging any well, or laying pipes therefrom, "at any other point within 300 feet" of appellees' property.

The complaint was in two paragraphs, to the first of which, named second in the record, there was a special paragraph of answer, and to this answer a demurrer was sustained. The cause was submitted to the court for trial, and judgment rendered enjoining the company from drilling the well. The rulings on the pleadings and the overruling of the motion for a new trial are assigned as errors.

It is doubtful whether the evidence is in the record. There is a certificate by a reporter that the evidence was taken down by him in shorthand, and then transcribed into the longhand writing, to which he certifies. The clerk also certifies "that the evidence set out in the bill of exceptions is the same that was taken by John Ingals, who is the official court reporter of the Howard circuit court." We might, perhaps, presume that the reporter was sworn; but there is nothing to show that his transcript of the evidence was filed with the clerk before it was incorporated in the bill of exceptions, or, indeed, that it was ever so filed and incorporated. The questions, however, which might be considered in passing upon the motion for a new trial are in a great measure those raised upon the pleadings. The main facts do not seem to be in dispute.

It appears that the appellant company was organized in 1891 for the purpose of buying land and machinery to engage in the manufacture of brick and drain tile. In pursuance of this object, the company during the same year, purchased 22 acres of land near the town of Windfall. The land was believed to contain an unlimited supply of natural gas, such as was needed to operate the business in which appellant was to engage. During the same year, at a cost of $25,000, the company erected its plant and machinery, locating the same near the highway on the west line of said tract, and within

200 feet of the land afterwards purchased by appellees. In that year, also, the company drilled a gas well near the southeast corner of its land, and obtained a sufficient flow of gas to run its factory until the year 1895, when the gas failed in that well.

It is averred, in the answer, that the 22-acre tract of land is not large enough to afford more than two sites for the location of a gas well such as would probably furnish gas in sufficient quantity to operate the factory; that, on the failure of the east well, it was necessary to suspend the operations of the factory until another well should be located and drilled; that, three years after the location of the plant, the appellees, with full knowledge of all the facts, purchased the land on which they erected the dwelling house in question; that in 1895, on the failure of appellant's first well, and while appellant was prospecting for the location of a second well, the appellee, Willard E. Patterson, gave his consent that a well might be sunk on the west side of appellant's land, not to be nearer than 150 feet to appellee's said dwelling, and that appellant, relying upon this agreement, proceeded to drill the well here in question, and to lay the gas mains therefrom; that, after the company had been engaged for four days in sinking the well, and when they were about to begin drilling the rock, the restraining order was issued; and that the point selected for drilling the second well was the furthest possible from the first well, and the best that could be selected.

The reasons given in the complaint to show why the injunction should be issued were: That if the proposed well should be completed, there would be a continuous loud noise, depriving appellees of the enjoyment of their property, and greatly depreciating its value; that natural gas is a very explosive and inflammable substance, and, when confined under the surface of the earth, permeates the soil for hundreds of feet, and, as soon as freed in the air, produces a stench, tarnishes paint, furniture, and silverware, and renders the

atmosphere unfit to breathe for many feet around the place of such escape; that the pipe line, if constructed to carry gas at rock pressure, as intended, would endanger the lives and property of appellees and their family; that gas wells attract the electric fluid, and are exceedingly liable to be struck by lightning; that in the digging of said well, there is danger of bringing from the earth other substances, such as water and oil; and that, if the well should overflow with either oil or water, great damage would result, rendering appellees' property unfit for the purposes for which they hold the same.

The dangers thus apprehended by appellees were such as might arise in case the well should be sunk, and gas, oil, or water be found. It is not said that any evil result could come merely from the drilling of the well. But the well might be sunk into the Trenton rock, and yet no gas, oil, or water be brought to the surface. It is not clear, therefore, that the danger apprehended is so imminent as to warrant the issue of a restraining order. In addition, it may be questioned whether an injunction should in any event issue, unless it be true that a gas, oil, or water well is a nuisance *per se,* or unless it should be made to appear that the well and pipes of appellant were to be improperly put down, and afterwards carelessly attended to.

In *Dalton* v. *Cleveland R. Co.,* 144 Ind. 121, 43 N. E. 130, the appellant sought to enjoin the erection on appellee's right of way of a coal chute, to be used for supplying its engines with coal, and to be situated very near to a building owned and used by appellant as a dwelling and business house. It was alleged that, from the height and character of the structure, it would greatly interfere with appellant's access, view, light, and air; would cause unusual, loud, and offensive noises; disturb sleep; cause coal dust, fumes of sulphur, and other noisome gases to be blown into appellant's building, injuring furniture, stock in trade, and in other

ways greatly impairing the value of appellant's property, and causing annoyance, discomfort, and danger to appellant, and to the occupants of his building. The court, in that case, while not denying that unlawful uses of the structure might be restrained, yet held that, as the erection of the building would of itself not constitute a nuisance, a writ could not issue, for the reason that the threatened evils might never result. The case of *Keiser* v. *Lovett,* 85 Ind. 240, and other authorities, were there cited, and the court concluded that "each of these cases recognizes the rule that equity will not restrain that which is not a nuisance upon the claim that it may be so used as to constitute a nuisance."

A business which is a nuisance *per se,* as also one that is so conducted as to have become an actual nuisance, will be enjoined. But a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable; and, since the remedy is so severe, resulting often in wholly depriving an owner of the use of his property, the court will proceed with the utmost caution in restraining such threatened and possible injuries.

It was said, in *Duncan* v. *Hayes,* 22 N. J. Eq. 25, that "a court of equity will not restrain, by injunction, any lawful business, or the erection of any building or works for such business, because it is supposed or alleged that such business will be a nuisance to a dwelling near it; it must be clear that the business will be a nuisance, and that it cannot be carried on so as not to be such."

And in *McCutchen* v. *Blanton,* 59 Miss. 116, the court said: "Every doubt should be solved against the restraint of a proprietor in the use of his own property for a purpose seemingly lawful and conducive both to individual gain and the general welfare. Relief by injunction is so severe in its consequences that it is not to be granted in such a case, except when the right to it is clearly and conclusively made

out. To interfere with one's right to use his own land for the production of what he pleases, in a case of doubt, would be a flagrant abuse of power. It is not enough to show a probable and contingent injury, but it must be shown to be inevitable and undoubted." See, also, *Cleveland* v. *Citizens' Gas Light Co.*, 20 N. J. Eq. 201; *Ryan* v. *Copes*, 11 Rich. Law, 217, 73 Am. Dec. 106, and note; *Doellner* v. *Tynan*, 38 How. Prac. 176; *Rhodes* v. *Dunbar*, 57 Pa. St. 274; *Huckenstine's Appeal*, 70 Pa. St. 102; *Gilbert* v. *Showerman*, 23 Mich. 448; *Owen* v. *Phillips*, 73 Ind. 284; *Barnard* v. *Sherley*, 135 Ind. 547, 34 N. E. 600, and 35 N. E. 117.

In *Doellner* v. *Tynan*, *supra*, it was held that where a street in a city ceases to be used as a place of residence, and is changed to a place of business, no one or two persons, who may, for any reason, desire to continue their residence therein, should be allowed to prevent the carrying on of a lawful and useful trade merely because they are or may be subjected to annoyance or even loss thereby. And in *Gilbert* v. *Showerman*, *supra*, the court refused to restrain the carrying on, in a proper manner, of a steam flouring mill in the business part of a city, notwithstanding the use of such building for that purpose caused annoyance to the complainant and his family, and rendered the occupation of his building as a residence less desirable than it otherwise would be. In that case Judge Cooley said: "The most offensive trades are lawful, as well as the most wholesome and agreeable; and all that can be required of the men who shall engage in them is that due regard shall be had to fitness of locality. They shall not carry them on in a part of the town occupied mainly for dwellings, nor, on the other hand, shall the occupant of a dwelling in a part of the town already appropriated to such trades have a right to enjoin another coming in because of its offensive nature. Reason and a just regard to the rights and interests of the public require that in such case the enjoyments of pure air and agreeable surroundings for a

home shall be sought in some other quarter, and a party cannot justly call upon the law to make that place suitable for his residence which was not so when he selected it."

In the case at bar, the appellant, in locating its brick and tile works, for which natural gas was to be used as fuel, selected a place retired from all residences, and there erected its plant and machinery at great expense. The business so commenced was continued for three years before the appellees came and erected their dwelling upon land across the highway from appellant's land and within 200 feet of its brick and tile works. Certainly, therefore, unless the works should constitute a nuisance *per se*, or unless they were so conducted as to become a nuisance in fact, the appellees are not in a position to demand that equity restrain the appellant in the use of its property.

A nuisance *per se*, as the term implies is that which is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house or an obstruction to a highway or to a navigable stream. But a business lawful in itself cannot be a nuisance *per se*, although because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Certain kinds of business or structures, as powder houses or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter houses and certain foul-smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even from the near neighborhood of family residences. Yet there must be some proper place where every lawful business may be carried on, without danger of interference on the part of those who in some slight degree may be annoyed or endangered by the nearness of the objectionable occupation. Of course, all persons have the right to insist

that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care, and improved methods and appliances, many occupations formerly regarded as nuisances may now be carried on, even in populous neighborhoods, without annoyance to any one. So, an establishment in some degree offensive, as a livery stable, may be kept so cleanly, so free from anything to offend the sense of sight or of smell, that the proprietor may invite his most fastidious visitors to any part of it, although the same establishment might also be so kept as to be an abomination to even the passer-by upon the highway.

It cannot be said that a plant for the manufacture of brick and drain tile, or even a gas well sunk to supply fuel for such a plant, is a nuisance *per se*. The business is lawful, and, if located in a proper place and conducted and maintained in a proper manner, neither the plant nor the well can be treated as a nuisance.

Appellees voluntarily selected the neighborhood of appellant's plant for their residence, three years after the appellant began business there; and, while this circumstance is not controlling, yet it is one that must be taken into consideration. Nor will it be sufficient answer that appellant's gas well was on the east side of the brick yard at the time the appellees selected their home on a lot within 200 feet of the factory. Experience has shown that gas wells are of short life, and that, after the failure of one well, another, in order to be successful, must be located at a considerable distance from the first. It is averred that there was room for but two wells on this 22-acre tract, and that the location of the proposed well is the furthest possible from the first well, and the best that could be selected. It is, besides, admitted by the demurrer to the answer that the appellee

Willard E. Patterson agreed that the second well should be located within 150 feet of his house; and, while it is possible that such agreement might not bind his co-appellee, yet the circumstance shows that the appellant, in locating its well at the distance of 152 feet from appellees' dwelling, was proceeding carefully and with due regard to appellees' rights.

Unless, therefore, it should be made to appear that the gas well could not be so managed and maintained as not to be of more than slight or barely possible danger or annoyance to appellees, it does not seem that they could have any sufficient cause to ask that the sinking of the well be restrained. The record does not show, nor have we any means of knowledge, that a well at a distance of 152 feet, or over 9 rods, from a dwelling house, cannot be so maintained and cared for as not to cause the injury and annoyance claimed to be threatened to appellees in this case.

It is to be remembered that, before a court of equity will restrain a lawful work from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur. An injunction will not issue to prevent supposed or barely possible injuries. In the case before us it is not shown that, even if the gas well were in operation, it could not be so managed and cared for as to avoid all the injuries apprehended. But, more than this, there might never be any gas found in the well. This the appellees practically concede when they recite that, although gas might not be found, yet that oil, or even water, coming from the well would be dangerous to their residence. This is altogether too speculative. If the appellant company is willing to invest its money in a well from which may be brought to the surface of the earth an uncontrollable element, productive of the evils feared by appellees, it must do so at the hazard to itself of all the consequences for which it would thus become liable. But if the well may be sunk, and the gas, oil, or water therefrom, if any, can be so con-

trolled and managed as to cause no appreciable injuries to appellees or to any one else, then such reasonable and lawful use of property ought not to be prevented by the courts. To do so would be sheer usurpation of arbitrary power.

We do not think the statute alluded to (Rev. St. 1894, § 5108; Acts 1889, p. 22), in relation to condemnation proceedings for gas pipe lines, and providing that lands for such purposes shall not be condemned within 75 yards of any dwelling or barn, has any application here. Appellant had not instituted any condemnation proceedings, but was at work on its own land. Besides, the statute permits pipes to be laid along a public highway, notwithstanding the nearness of the buildings named; and, in the case at bar, not only was appellant engaged in sinking a well and laying pipes on its own lands, but there was a public highway between its lands and those of the appellees.

We are, therefore, not satisfied that the record presents a case warranting the issuing of the writ of injunction.

The judgment is reversed, with instructions to sustain the demurrer to each paragraph of the complaint, and to overrule the separate demurrers to the second paragraph of the answer, and for further proceedings not inconsistent with this opinion.

UNITED STATES v. CHARLES BLACKBURN ET AL.

(48 Pacific 904. Supreme Court of Arizona. May 15, 1897.)

[1]**Must be mines of known value.** To prevent a valid agricultural entry there must be a mine of known value at the date of entry. That there had been work done and ore extracted from time to time but no permanent profitable mine developed is not enough.

Laches is a good defense against the government where twelve years have elapsed and innocent purchasers have acquired interests in the land.

Appeal from District Court, Yavapai County; before Justice A. C. Baker.

Action by the United States against Charles Blackburn and others. From a judgment for plaintiff, defendants appeal. Reversed.

JOHNSON & SLOAN, for appellants.

[1]The same test of priority in time and the holding that discovery of mineral after title vested in the prior claim does not divest its priority and that the mineral value must also be substantial, is applied generally in like contests between any two classes of claims where the point becomes material. *Casey* v. *Thieviege*, 18 M. R. 624. *Cleary* v. *Skiffich*, 28 Colo. 362; 65 Pac. 59.

Agricultural patent may be impeached at law by showing that at date of final proof there were known mineral deposits. *Kansas City M. Co.* v. *Clay*, (Ariz.) 29 Pac. 9. *Contra*, *Dreyfus* v. *Badger*, 108 Cal. 58; 41 Pac. 279.

An assay certificate no proof of valuable mineral land. *Dobler* v. *Northern Pacific Ry.* 17 L. D. 103.

Burden of proof is on mineral claimant for land returned as agricultural to show it of greater value for mining purposes. *Id.*

Location certificate is no proof of mineral character of land. *Etling* v. *Potter*, 17 L. D. 424.

Gold in non-paying quantities does not prove mineral value. *Id.*

Where agricultural claimant procures cancellation of mineral claim he has the first right of entry. *Rinda* v. *Northern Pac. Ry.* 19 L. D. 184.

E. E. ELLINWOOD, U. S. Atty., and E. M. SANFORD, for the United States.

BETHUNE, J. This is an action on the part of the United States for the cancellation of a patent issued on the 15th day of December, 1878, to one of appellants here for a certain tract of government land situated in Yavapai county, under a pre-emption cash entry made by said Blackburn in August of that year, on the grounds "that said land was not agricultural land, and not subject to entry except as mineral land; that the same is, and at the time of said entry was, known to be mineral land; that it has never had any value whatever as agricultural land, and is not susceptible to cultivation;" and "that Blackburn made the pre-emption entry for the fraudulent purpose of procuring a larger amount of mineral land at a smaller price than it could have been purchased for under the mineral land laws." The complaint alleges that one day after the issuance of the patent to Blackburn he conveyed the land to one Mrs. Bean, and that she and her husband knew the land to be more valuable for minerals than for agriculture, and that Blackburn was conveying the land to her in fraud of the rights of the United States. Mrs. Bean kept the land until August, 1889, when she conveyed it to one J. W. Clay, one of the defendants in this action. The record fails to show that the defendants knew of the existence of mineral in any appreciable quantity on the land at the time entry was made by Blackburn, or, in fact, until June 1, 1889, when, it is inferentially admitted by the answer, it became known that a mine existed upon the land. Several of plaintiff's witnesses testified that they did not know that defendants had any knowledge of the mineral character of the land at the time of Blackburn's entry, and none testified that they did. The evidence relied upon by plaintiff is, in brief: That one William Pierce made a location upon what was the Hassayampa ledge in 1869 or

1870, within the boundaries of the Blackburn entry; that Pierce worked the property down to a depth of 15 or 16 feet through quartz which carried galena, and perhaps a little sulphur; that Pierce had abandoned his location before Blackburn's entry; that C. A. Behm, one of the witnesses for plaintiff, had examined ore on the dump, and found it valuable; that the dump was there three years prior to the trial of this case; that he had tried to exploit the mine, and could not do so because of too much water; that he (Behm) worked on the north half of the ledge, and quit work on account of the water; that no one is working there now; that he did not make any money out of it; considered the ore valuable, but did not know how much it was worth, or how much it cost to mine it; that Pierce had a windlass on the Hassayampa ledge, and worked there in 1876-77, and that in 1878 a man prospecting there would see evidence of abandoned claims; and that, if pumping machinery be put in, and the ledge prospected thoroughly, it would pay; that E. A. Rupert, his father, and brother located the Silver King mine in 1882 or 1883, and there was at that time a shaft on the mine; that he sorted the ore on the dump, and shipped something over a ton, which brought $182; that he sold the Silver King to the Kansas City Mining & Milling Company, which worked the mine, and then quit it; that prior to the year 1878 one Charles Bishop raised potatoes, cabbages, corn, and other agricultural products on the land, which is a narrow strip up and down the creek, and taking in all there is of the creek bottom; that E. A. Rupert, one of plaintiff's witnesses, at the time he lived on the Silver King mine,—from 1886 to 1889,—supported a family of from four to eight from the mine. On the part of the defense it was shown that there were different patches of land on the claim in controversy fenced in and cultivated in vegetables prior to 1878; that there were no indications of mines upon the land in 1878, but there were some prospect holes; that since

1878 those who have worked on this land seeking mines have done it at a loss; that since 1878 one of the Ruperts had worked there, and the Kansas City Mining Company had also worked the mine, but that everybody who had worked the mine found it unprofitable; that Rupert got money out of it by selling to the Kansas City Mining & Milling Company.

No lands upon which are situated any known salines or mines are subject to pre-emption (Rev. St. U. S. § 2258), and the existence of such salines or minerals must be known at the time of entry. In the contest of *Cleghorn* v. *Bird,* before the department of the interior, Secretary Lamar said: "It has been repeatedly held by this department that it must appear, not that neighboring or adjoining lands are mineral in character, or that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral character, but that as a present fact it is mineral in character." 4 Land. Dec. Dep. Int. 478. And this view has been adopted by the courts. *U. S.* v. *Reed,* 28 Fed. 482. From the record before us it is impossible to draw an inference that any known mineral deposit of any value existed on the land in question at the date of Blackburn's entry. It does appear that the land contains some mineral, and that the assay of ore taken from the old Pierce shaft showed sufficient value to indicate that the land might be valuable for mining, provided ore of that value could have been obtained in sufficient quantity, and extracted and worked at a profit. But the evidence on this is conclusive that every one who has worked the mine on this land has found it unprofitable.

We might rest the decision of this case on the branch of it already treated of, but there is another feature raised by the record, and pleaded as a bar to the action, to wit, the lapse of time from the entry of the land and the institution of this action. We think this plea is well taken. The entry was made by Blackburn in 1878, and this action was brought in

the year 1890,—12 years after the cause of action accrued,—and during which time innocent purchasers acquired interests in the land. "Courts of equity will not entertain a suit to vacate a decree, even in case of palpable frauds, where there has been unnecessary delay in its introduction, and the rights of third parties have intervened in reliance upon the decree. Consideration of public policy requires prompt action in such cases; and if, by delay in acting, innocent parties have acquired interests, the courts will turn a deaf ear to the complaining party. This is a doctrine of equity irrespective of any statute of limitations, and irrespective of the character of the suitors. It is essential that this doctrine should be vigorously upheld for the repose of titles and the security of property." *U. S.* v. *Flint,* 4 Sawy. 60, Fed. Cas. No. 15,121. "Although statutes of limitation do not run against the government, yet the staleness of the claim may be taken into consideration in determining the question whether a court of equity should interfere and grant relief where the United States as well as a natural person is a plaintiff. When the United States comes into a court of equity as a suitor, it is subject to the defenses peculiar to that court." *U. S.* v. *White,* 17 Fed. 565; *U. S.* v. *Tichenor,* 8 Sawy. 156, 12 Fed 449. No doctrine of elementary law is more thoroughly established than this. Our conclusion is that the bill in this case should have been dismissed. The judgment of the lower court is reversed, with directions to enter judgment for the defendants for their costs in this action.

ROUSE, J., concurs. HAWKINS, J., having been of counsel in this case in the court below, took no part in this case in this court.

MANUEL P. CARDOZA ET AL. v. JAMES W. CALKINS ET AL.

(117 California 106; 48 Pac. 1010. Supreme Court. May 25, 1897.)

[1]**Possession good against later intrusion.** Plaintiff's actual and peaceable enjoyment and possession of waters is sufficient title as against one who diverts them during such possession, and shows no better title.

[2]**Notice not followed up.** One who files notice of appropriation of waters, but does not construct a ditch to divert them, and never takes any of the water till eight or ten years after, when in two or three instances he diverts it in a fugitive manner by tapping the ditch of another, makes no valid appropriation.

Amicable interference of third parties. Efforts of persons having water rights to amicably adjust the claim of another to the use of the waters gives no validity to his claim.

Where a ditch notice is allowed in evidence but is not followed by proof of timely appropriation of the water, it should be stricken out.

Department 1. Appeal from Superior Court, Siskiyou County; J. S. Beard, Judge.

Action by Manuel P. Cardoza and others against James W. Calkins and others. Judgment for defendants. Plaintiffs appeal. Reversed.

JAMES F. FARRAHER, for appellants.

WARREN & TAYLOR, for respondents.

[1]*Haws* v. *Victoria Co.* 160 U. S. 303.

[2]The waters of the whole stream may be taken; once taken the branches above may not be tapped. *Malad Val. Irrg. Co.* v. *Campbell*, (Idaho) 18 Pac. 52.

Notice of appropriation holds for a reasonable time. *Dyke* v. *Caldwell*, (Ariz.) 18 Pac. 276.

An appropriator can hold only the maximum quantity which he has devoted to a beneficial use. *Smith* v. *Hawkins*, 120 Cal. 86; 19 M. R.—.

A placer location is *ex vi termini* an appropriation of the water running over it. *Schwab* v. *Beam*, 86 Fed. 41.

VAN FLEET, J. The action involves the right to the use of the waters of two gulches known respectively as "Heybrook Gulch" and "Barker Gulch," tributary to Greenhorn creek, in Siskiyou county.

The complaint alleges the ownership in plaintiffs and their predecessors for upwards of 40 years of a ditch known as the "Cornish & Co. Ditch," which taps said Greenhorn creek, and in its course along the bank of said creek crosses the two gulches named, and takes the waters therefrom; that the carrying capacity of said ditch is 300 inches, measured under a 4-inch pressure, and that by means thereof plaintiffs and their predecessors have, during said period, and down to the interference of the defendants, appropriated from said creek and said gulches, and devoted to a beneficial use, that quantity of water, which ordinarily included all of the waters of said two gulches; that the plaintiffs' right includes the use of the waters of said creek every day between the hours of 6 o'clock p. m. and 6 o'clock a. m. and the waters of said gulches all of the time, both day and night; that in January, 1895, within 30 days prior to the bringing of the action, and at a time when there was less than 300 inches of water available to plaintiffs from said source, defendants, without right, by means of flumes, etc., diverted the waters of said gulches from plaintiffs' ditch to their own use, and have since continued so to do, and refuse to permit plaintiffs to restore said waters to said ditch.

In a separate count the complaint sets up a prescriptive right in plaintiffs to the use of said waters.

The prayer is for an injunction. The answers deny plaintiffs' right, by appropriation or otherwise, to the waters of said gulches, and set up in defendants Smith and Harrison a right to the waters of Heybrook gulch, and in the defendants Calkins and Plummer the right to the waters of Barker gulch.

The court found in plaintiffs the ownership of the ditch

as alleged, and an exclusive right to the waters of Greenhorn creek and the said gulches "from the hour of 6 o'clock p. m. of each day to 6 o'clock a. m. of the following day," but found "that the use of the waters of Heybrook and Barker gulches has never been appropriated, held, or used by plaintiffs or their predecessors in interest, to wit, Morris, Renner, Trustee, and Thomas Orr, as a right during the daytime; that is, between the hours of 6 o'clock a. m. and 6 o'clock p. m., since the construction of said Cornish & Co. ditch. But the waters of said gulches have been used by the miners in main Greenhorn creek and said gulches during the day for many years last past." It further found that the defendant Smith had, during the month of January, 1895, diverted the waters of Heybrook gulch as alleged, and that during said month defendants Calkins, Plummer, and Harrison had diverted the waters of Barker gulch, but that such diversion was only during the daytime, and was not wrongful as against plaintiffs. It also found against any prescriptive right in plaintiffs.

Judgment was entered for the defendants. Plaintiffs appeal from the judgment and from an order denying them a new trial, contending mainly that the findings are against the evidence.

The evidence as presented in the record is not as specific and satisfactory on behalf of either party as might be wished. On behalf of plaintiff it shows that one Burgess built the Cornish & Co. ditch in 1852, and by means thereof took and appropriated to a beneficial use all the waters of main Greenhorn creek and its tributaries, including the two gulches in dispute, when the ditch would hold them, which it would at all ordinary times, and when not he took all that the ditch would carry, which was about 300 miner's inches; and during the time Burgess owned the property he kept the waters of the creek and these gulches running in the ditch all the time, both day and night. Burgess sold out in 1856, but to

whom does not appear, and the subsequent ownership of the ditch and water right, and the extent of the use of these waters intervening 1856 and down to about 1879 or 1880, is not definitely disclosed, although the evidence indicates that it was in continuous use during the mining season throughout all these years. Cornish, after whom apparently the ditch came to be known, is the next owner mentioned in the record, but when he became such is not shown. One Thomas Orr bought from Cornish, but the date of the latter's purchase is not given, and the evidence indicates that Orr did not acquire by his purchase the full extent of water right appropriated and exercised by Burgess, at least so far as the waters of Greenhorn creek are concerned; that as to the latter it was limited to the night waters. But the evidence shows without substantial conflict that during all the time Orr owned the property—which was at least from 1879 or 1880 down to 1892—the waters of these gulches were diverted by and ran into the Cornish ditch, and were appropriated by Orr and his lessees, both day and night, without objection or material interruption by any one.

In March, 1892, Orr conveyed his interest in the ditch and water right to one Charles Bohnert, the property being described in the deed as "that certain ditch taking in the waters from the main Greenhorn creek and the gulches adjacent thereto, and conducting the same to the north fork of Greenhorn creek, together with the flumes, taps, and reservoirs connected therewith, and formerly known as the 'Cornish & Co. Ditch,' together with the right to all the water in main Greenhorn creek naturally flowing therein from six o'clock p. m. to six o'clock a. m. of each and every day throughout the year. * * * Also all the waters flowing down all the gulches across which the said ditch is built."

In January, 1893, Bohnert made a contract of sale and deed in escrow of the ditch and water right to the plaintiffs,

wherein the property is described substantially as in the deed from Orr to Bohnert, and under this contract the plaintiffs have since been in possession of and were holding the property at the commencement of the suit. During the ownership of both Bohnert and plaintiffs the disputed waters have been, as theretofore, taken and diverted through the Cornish ditch, both day and night, until January, 1895, when the defendants diverted the same therefrom in the manner alleged.

The evidence on the part of the defendants was to the effect that in June, 1882, one Austin Hawkins filed and recorded a notice stating that he appropriated the waters of Heybrook and Barker gulches "for mining purposes, and to mine the claim situated on said Greenhorn creek, known as the 'Clark and Comstock Placer Mine.'" The notice stated that he intended to divert said waters by means of a ditch (describing it) to be constructed, and giving the point of his intended diversion. No ditch, however, was ever built, nor did it appear that the notice of appropriation was ever posted. Hawkins testified: "I am the Austin Hawkins named in the water notice which you have read. * * * I have used the waters some myself from those gulches, and others through me have used it at different times since the location. A year ago last fall I worked there myself. I have also given other parties consent to go and work there. They used the waters from these gulches through the Cornish & Co. ditch; that is, we took it from that ditch. I could not tell the amount of work that has been done there. I know that my sons Rob and Nort worked there one season. I used the water out of that Cornish & Co. ditch when I worked there. We did not use the water very much any one year,—not to exceed two months in the year,—and I can't say the number of years the water was used. * * * The use of the waters from this Cornish & Co. ditch through me by the other persons whom I have named was without consideration. My familiarity with the Cornish & Co. ditch and my mining

claim commenced about 1881, when I located the claim. The ground had previously been occupied by Chinese. This Cornish & Co. ditch runs across a portion of my claim, and it was there when I located the claim. The waters from Heybrook and Barker gulches ran into this Cornish & Co. ditch, and from there we took it onto our ground."

He also testified that one Tryon, while attending the Cornish ditch under Thomas Orr, applied to him at different times to get "the exclusive privilege of the day water of those gulches," which he declined to grant him; and that the winter before the suit was brought, while his boys were working on his claim, plaintiffs came to him, and wanted to "make arrangements with me to allow the boys to use the night water, and let them use the day water. * * * At that time the main ditch ran from Greenhorn creek, and the waters from these gulches ran into it. They wanted me to make arrangements for the boys to take the night water, and to allow them to use the day water. I was claiming the right to the use of the waters of main Greenhorn creek during the daytime. They wanted to bring the thing around so they could get the day water. * * * I only claimed the day water from these gulches."

Norton Hawkins, a son of Austin Hawkins, testified: "I am not very familiar with the Heybrook gulch, but am pretty familiar with the Barker gulch. I think that during the last three years I have performed some mining work on Greenhorn. I worked there two springs on my father's claim. I used the waters from both of these gulches for mining purposes. I used it through the old Cornish & Co. ditch. The first spring I worked there two or three months, and the next spring two or three weeks, I think. The first spring I used all the water I wanted,—all I could get in the ditch in the daytime. In the nighttime the water went to waste."

Robert Hawkins, another son, testified: "During the spring of 1895 two railroad boys and myself worked a while

on my father's claim on Greenhorn creek. We took the water that we used from plaintiffs' ditch."

Defendant Smith testified, in substance: "I am one of the defendants herein. In the spring of 1895 I conveyed the waters of Heybrook gulch in a flume across plaintiffs' ditch, and used it down below their ditch. I had permission from Mr. Hawkins to use the waters from this gulch."

The testimony of defendant Calkins was: "Defendant J. W. Plummer and myself placed a flume in plaintiffs' ditch across Barker gulch, and took the waters of said gulch under said flume, and used them during the spring of 1895. We used them until the injunction stopped us. We used also a portion of the waters of Heybrook gulch by r unning them in an old ditch from Heybrook gulch to Barker gulch, and running them under plaintiffs' ditch. The defendant Al Smith gave us the permission to use these waters from Heybrook gulch. No one gave us permission to use the waters of Barker gulch. We simply took them."

The foregoing is substantially all the evidence from the record, and we think it quite manifest that it does not support the finding of the court, above quoted, to the effect that the day waters of these gulches had never been appropriated by plaintiffs or their predecessors in interest; that is, between 6 o'clock in the morning and 6 in the evening. To our minds, the evidence shows without any substantial conflict that this water had been so appropriated and was being so used long before and at the time of the interference therewith by defendants. Whether the evidence establishes a perfect title in plaintiffs to the use of the waters as against all the world need not be determined, since it unquestionably shows that plaintiffs were in the actual and peaceable enjoyment and possession of these waters at the date of defendant's diversion. Such possession was sufficient as against any one having no better right (*Utt v. Frey*, 106 Cal. 395, 39 Pac. 807); and defendants show no such right.

The entire basis of their claim is the right supposed to have been acquired to the water of these gulches through the attempted appropriation by Austin Hawkins in 1882. But, even if the water was open to Hawkins' appropriation at that time,—which does not appear,—the acts of Hawkins never amounted to a valid appropriation thereof. He failed to follow up the filing of his notice by any actual appropriation of the waters. His contemplated ditch by which to divert the water was never constructed, nor did he ever in fact take any of the water except in two or three instances, when it was diverted in a fugitive manner by tapping plaintiffs' ditch. Even these attempts do not appear to have been made until some eight or ten years after the filing of his notice. He says: "I have used the waters some myself from these gulches, and others through me have used it at different times since the location." But when he undertakes to give the dates of such use, either by himself or others by his authority, it all appears to have occurred within one or two years prior to the commencement of the action, and at no time was the water diverted other than by taking it from plaintiffs' ditch until the diversion made by the defendants in January, 1895.

The fact that Tryon, while holding under Orr, and that the plaintiffs after their purchase, made efforts to amicably adjust the claim of Hawkins to the use of the waters of these gulches does not in itself establish any right in the latter, nor impart any validity to his claim which it did not otherwise possess.

The diversion of the water by the defendants, being based solely upon their supposed license from Hawkins, was wholly without right, and they were, therefore, in undertaking to interfere with the possession of the waters by plaintiffs, mere trespassers; and the finding that their acts were not wrongful as against plaintiffs is without support.

The other points made require no special notice. It sufficiently appears from what has been said in discussing the evidence that the court, as the evidence stood, should have granted plaintiffs' motion to strike out the notice of appropriation made by Hawkins. The other ruling complained of was not material.

Judgment and order reversed.

HARRISON, J.; BEATTY, C. J., concurred.

FENNO WAKEMAN v. WILLIAM NORTON.

(24 Colorado 192; 49 Pac. 283. Supreme Court. June 1, 1897.)

The defense that plaintiff is not the real party in interest must be specially pleaded.

[1]**Recovery on possession.** Plaintiff in trespass in possession under paper title may recover without proof of his chain of title against a party defending under a separate title to wit: a lode dipping underneath the plaintiff's location.

[2]**It is to be presumed that the owner of a mining claim is the owner** of all deposits of ore within the side lines of the location, until it shall be shown by a preponderance of the testimony that such deposits are part of a lode having its top or apex within the boundaries of another's claim.

[3]**One side line and one end line.** It is error to charge that an apex claimant to justify intrusion into adjoining ground must have a lode whose apex passes through both end lines.

Presumption of continuity in favor of extra lateral claimant. The prima facie presumption that a lode whose course and strike is substantially parallel with, and runs in the same direction as, the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved.

Appeal from District Court, Dolores County.

Action by William B. Norton against Fenno Wakeman to recover the value of ore wrongfully taken from plaintiff's claim. From a judgment for plaintiff, defendant appeals. Reversed.

On February 21, 1893, William B. Norton commenced this action against Fenno Wakeman in the district court of

[1]*Haws* v. *Victoria Co.* 160 U. S. 303. *Sears* v. *Taylor*, 5 M. R. 318.

[2]Possession of surface is possession of vein below on the dip. *Montana Co.* v. *St. Louis Co.* 102 Fed. 431. *Montana Co.* v. *Boston Co.* (Mont.) 71 Pac. 1005.

[3]*Del Monte Co.* v. *New York Co.* 18 M. R. 188.

Dolores county. On May 16, 1893, an amended complaint was filed, upon which the cause was tried, wherein it is *inter alia* averred that from March 1, 1887, until January, 4, 1893, the plaintiff was the owner and in the actual occupation and possession of the Zona K lode mining claim, situate in the Pioneer mining district, county of Dolores, state of Colorado, describing the same by metes and bounds; that during that time the defendant wrongfully and secretly broke, extracted, and removed therefrom silver, lead, and gold bearing ores, to the amount and value of $30,000.

The defendant, in his answer, denies each and every allegation of the complaint not thereinafter admitted or qualified, and admits that between April 1, 1891, and October 15, 1892, he, as owner in and lessee of his co-owners of the Ethlena lode mining claim, situate in the same mining district, and adjoining the Zona K claim on the west, in following the Ethlena lode on its dip, entered the ground in controversy, and took and removed ore therefrom of the aggregate value of $2,500, and, as an affirmative defense, in substance avers that there exists a certain lode and vein within the surface boundaries of the Ethlena claim, which extends on its course and strike lengthwise through said claim, in the same general direction as its sidelines; that said lode and vein is in rock in place, and extends downward with a dip and trend to the eastward, and departs so far from a perpendicular in its downward course that it passes through and beyond the eastern sideline of said claim, drawn vertically downward, and into ground within the surface boundaries of the Zona K claim; that he, as a co-owner in and lessee of the other owners of the Ethlena claim, commenced work on said vein and lode below its apex, and within the surface boundaries of the Ethlena; that, in exploring the same on its dip, he ran drifts, stopes, and levels beyond and to the east of the eastern sideline of the Ethlena, into the ground in controversy; that all of said work was done

upon and in said vein; and that no other entrance was made by him upon the Zona K claim, and whatever ore he may have taken was taken in the exercise of his right to follow said vein on its dip.

Plaintiff, by his replication, traversed the allegations of the answer. The cause was tried to a jury. Upon the conclusion of plaintiff's evidence in chief, a motion for nonsuit was interposed and overruled. Thereupon evidence was introduced by the defendant on his part, and evidence in rebuttal by the plaintiff. Verdict and judgment rendered in favor of plaintiff for $3,000 and costs. To reverse this judgment, Wakeman prosecutes this appeal.

JOHN KINKAID and H. M. HOGG, for appellant.

MORRISON & DE SOTO, for appellee.

GODDARD, J. The specifications of error are numerous, but the important objections they present may be included in the following questions: First. Was the action rightly prosecuted in the name of the plaintiff? Second. Was the evidence introduced by plaintiff sufficient to show a valid location of the Zona K claim, and prima facie ownership by him of the ground from which the ore was taken? Third. Did the court err in giving and modifying certain instructions defining the law relative to apex rights?

Upon the trial of the cause, the defendant undertook to show that the plaintiff was not the real party in interest, by inquiring of plaintiff, upon cross-examination, if he had not in parting with his title to the Zona K claim prior to the commencement of suit, transferred to his grantee the right of action for the trespass complained of. We think the objection to this inquiry was properly sustained. Aside from the reason that it was not proper cross-examination, it was clearly inadmissible under the pleadings, such defense not having

been pleaded. The defense that a plaintiff is not the real party in interest, to be available, must be specially pleaded. Pom. Rem. & Rem. Rights, § 711, and cases cited.

It is urged in support of the second objection that the evidence introduced by plaintiff was insufficient to show a valid location of the Zona K claim, or title thereto in the plaintiff, and that it also failed to show that the vein from which the ore in controversy was taken had its top or apex within the surface boundaries of that claim, but that it did disclose the fact that such apex was not so included. It appears from the evidence that a location certificate of the Zona K claim was filed in 1880, by one McKenzie. Plaintiff testifies that he purchased the claim from one Dumont, and entered into possession in 1885. At that time he found a notice posted at the point of discovery, that the claim was staked, without specifying in what manner; that the discovery disclosed good ore at the outcrop of the Zona K vein; that he was in possession of the claim from the date of his purchase until he sold the same, in 1894; and that he did 110 feet of work on the claim.

It further appears that an amended location certificate made by him was recorded on September 15, 1890, and that he also made and filed another amended location certificate on October 2, 1891. The defendant asserts no claim to the Zona K claim itself, but justifies his intrusion within its surface boundaries upon his right to follow on its dip a vein which has its top or apex outside such surface boundaries. Notwithstanding his omission to produce the written conveyances showing the transfer of the title from the original locator to him, we think the evidence sufficiently shows a valid and subsisting location, in the actual and lawful possession of the plaintiff, which, prima facie at least, entitles him to maintain the present action.

But, assuming that the validity and ownership of the Zona K claim was sufficiently established for this purpose, appel-

lant still contends that the evidence introduced on the part of appellee was wholly insufficient to entitle him to a recovery, since it failed to show that the vein from which the ore in question was taken had its top or apex within the boundaries of that claim, and insists that the burden rests upon appellee to establish the fact that the ore was taken from a vein or lode whose top or apex is within the surface lines of his claim, to entitle him to a recovery therefor. In other words, that, so long as the intruder does not interfere with a vein whose top or apex is within the surface boundaries of plaintiff's claim, he has no right of complaint, regardless of the fact that ore is taken from within his ground, by one who neither has nor claims the lawful right to take the same.

With this contention we cannot agree. While it is true that the locator of a mining claim takes it subject to the right of others to follow and take ore from any vein on its dip through his ground the top or apex of which is included within another valid lode location, yet we think he is entitled to the presumption that what is contained within his surface boundaries is his, until the conditions upon which such extralateral right depends are shown to exist, by the one who seeks to avail himself of such right. In *Mining Co.* v. *Fitzgerald,* 4 Morr. Min. Rep. 380, Fed. Cas. No. 8,158, Judge Hallett thus concisely states what we believe to be the correct rule in such cases:

"Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until some one can show a clear title to it as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits, until some one shall show by preponderance of testimony that such de-

posits belong to another lode having its top and apex elsewhere."

To the same effect are *Doe* v. *Mining Co.*, 54 Fed. 935; *Consolidated Wyoming M. Co.* v. *Champion M. Co.*, 63 Fed. 540; *Duggan* v. *Davey*, 4 Dak. 110, 26 N. W. 887; *Cheesman* v. *Shreve*, 16 Morr. Min. Rep. 79, 37 Fed. 36; *Iron Silver M. Co.* v. *Elgin M. & S. Co.*, 118 U. S. 196, 6 Sup. Ct. 1177; *Iron Silver M. Co.* v. *Campbell*, 17 Colo. 267, 29 Pac. 513.

In this view the plaintiff's evidence was prima facie sufficient to show his ownership of the ore taken from within the ground of the Zona K claim, and it devolved upon the defendant to show his right thereto by a preponderance of evidence. The motion for nonsuit was properly denied. From this conclusion it follows that, in meeting the burden imposed upon him to show his right to the ore in question by reason of the ownership of a vein or lode the apex of which was included within the surface boundaries of the Ethlena claim, the defendant was entitled to have the jury correctly informed as to the law defining the rights of the owner of such a vein, and prescribing the conditions under which he is entitled to extralateral rights.

Appellant claims that the law in this respect was not correctly given; that the court erred in its general instruction No. 6, wherein the jury were informed that "the apex must pass through both lines claimed as end lines. If the apex of the vein does not so pass through both the lines claimed as end lines, such lines can be considered only as side lines, and no location which has not end lines within the intent of the law can give any rights beyond its surface boundaries." And also in modifying instructions Nos. 5 and 6, asked by him, which in substance requested the court to instruct the jury that if they found from the evidence that the owners of the Ethlena lode, or their grantors, had prospected and determined the course and direction of the Ethlena lode, and had

found the course and strike of the lode as far as developed to be substantially parallel with, and running in the same direction as, the side lines of said claim, that they were entitled, prima facie, to the presumption that such vein continues throughout the length, and passes through the end lines, of said claim. The court added a modification to the effect that such presumption obtained only for the purpose of rights over the surface of the claim, and within the surface boundaries thereof, extending downward vertically, thereby depriving defendant of the benefit of such presumption so far as extralateral rights were concerned. In instructing the jury that, in order to give any extralateral rights, it was essential that the apex or top of a vein should on its course pass through both end lines of a claim, the court imposed a condition that has not heretofore been announced as an essential to the exercise of such right in any of the adjudicated cases. It has never been expressly decided by the supreme court of the United States that if a vein enters one end line, and while its course and strike is more in the direction of the side than the end lines, yet at some point crosses a side line, that such vein may or may not be followed on its dip.

Nor do we regard that question as involved in this case. Neither the pleadings nor the evidence present that issue. The theory of defendant, as disclosed by the allegations of his answer and proof, is that the apex of the Ethlena lode is entirely within the Ethlena location, and passes through both end lines; while the plaintiff claims, and attempts to show, that if the lode from which the ore was taken has an apex, in the meaning of the statute, it is within territory to the north of the Ethlena claim, and runs parallel with its end lines. It is manifest, therefore, that the question whether a locator of a mining claim has a right to follow a vein on its dip, when its top or apex passes through one end line, and on its strike departs from one of the side lines of his claim,

is not presented in this case. The theory of defendant being that the Ethlena vein passes through both end lines, and having predicated his right to follow it into the ground in controversy because of the existence of that fact, he is not in a position to complain because the court gave the law applicable to such a theory. And since, therefore, the facts disclosed by the record do not require it, we are not at liberty to determine whether the extralateral right conferred by the statute is incident to a lode or vein the top or apex of which does not pass through both end lines. But we are of the opinion, however, that under the testimony defendant was entitled to have properly submitted to the jury the question whether the Ethlena lode did have an apex within the Ethlena claim, and if so, whether in its course, it extended through both end lines. If he and his grantors had prospected and developed the lode sufficiently to ascertain that, so far as developed, its course and strike was substantially parallel with, and ran in the same direction as the side lines, he was entitled to the prima facie presumption that it continued in the same direction throughout the length of the claim. *Armstrong* v. *Lower,* 6 Colo. 398, 581. And this presumption obtains where extralateral, as well as surface, rights are involved. We think, therefore, the court erred in modifying the instructions referred to in this respect, and that such error was probably prejudicial to defendant's rights. We deem it unnecessary to notice the other errors assigned. We think aside from the objections above considered, that the court correctly announced the law governing the case. For the reasons given, the judgment is reversed, and the case remanded.

Reversed.

INDEX.

ABANDONMENT.

1. *Abandonment is a mixed question of acts and intention* and therefore ordinarily a question for the jury. *Bartley* v. *Phillips*, 145

2. *Parol evidence is admissible of any agreement* between parties as to what should be considered due diligence in the construction of the lease. *Id.*

3. *A third party* not in privity with or claiming a second lease from the lessor, cannot prove abandonment by the lessee. *Id.*

4. *Failure to begin work is an abandonment* the same as ceasing to operate after operations begun. *Woodward* v. *Mitchell*, 158

5. *Proof without plea.*—Proof of the abandonment of a mining claim by a defendant may be given by plaintiff, in ejectment therefor, without a special plea, where the defendant pleads, and relies on as a defense to the action, a location prior to that of plaintiff. *Trevaskis* v. *Peard*, 353

6. *Taking advantage of intruders' development.*—Where the owner of a mining claim, which was erroneously included in a sale under a decree of court, moved his effects from the claim, and absented himself two years, allowing the purchasers to work it without objection, while knowing that their title was invalid and intending to claim it only in case their development rendered it profitable to do so, his acts will constitute an abandonment. *Id.*

7. *The want of intent to abandon* will not avail against conduct from which abandonment is a necessary conclusion. *Id.*

8. *Conditional abandonment.*—No such thing can be recognized as an intent to return under certain conditions. *Id.*

9. *Abandonment by sale.*—The conveyance of all interest in a possessory claim is an abandonment of all his estate in favor of the grantee. *Black* v. *Elkhorn Co.*, 375

10. *An abandoned claim becomes part of the public domain*, subject to sale and disposition by the government. *Migeon* v. *Montana Co.*, 446

11. *When intention to abandon and a surrender* of the claim unite, abandonment is complete, and operates instanter to restore the title to the United States. *Harkrader* v. *Carroll*, 474

ABANDONMENT. *Continued.*

12. *Where sale is made* after abandonment, the vendee or grantee takes no title. *Id.*

13. *Quitting the claim and removing* from the district on an indefinite expectation of regaining lost health, leaving the mine without work or representation amounts to abandonment. *Id.*

14. *A parol agreement as to what shall constitute due diligence* or abandonment, is binding on purchasers from the lessor without notice, but with knowledge of the existence of the lease. *Bartley* v. *Phillips*, 542

15. *Right to swear to intention.*—In cases of contract a man may not testify as to what was his intention but in cases of fraud and of abandonment he may so testify. *Id.*

See ANNUAL LABOR; FORFEITURE; MINING CLAIM, 2.

ACCOUNT.

1. *Injunction—Accounting.*—In case of trespass on a mining claim it is not necessary to bring separate actions for injunction and an accounting, but both may be had in the same suit. *Cons. Wyo. Co.* v. *Champion Co.*, 113

See INTEREST, 1; RENTS AND ROYALTIES, 1; TENANTS IN COMMON.

ADVERSE CLAIM.

1. *Court will not inquire into the land office proceedings.*—In a suit supporting an adverse claim the court has nothing to do with the proceedings in the land office or to pass upon their sufficiency. *Quigley* v. *Gillett*, 68

2. *Parties not required to show right to patent.*—The congressional act requiring that in an adverse claim suit, if neither party proves title, the jury shall so find, etc., cannot be construed to require the court in adverse cases to compel either party to show his right to obtain a patent for the ground. The court tries only the right to possession, decides this issue, and the application is then turned back to the land office. *Doe* v. *Waterloo Co.*, 266

3. *The citizenship of the stockholders of a corporation need not be proved* for the purpose of establishing its right to patent a mining claim, otherwise than by showing it to be organized under the laws of a state of which its stockholders are conclusively presumed to be citizens. *Id.*

4. *Where a third party holds a patent covering discovery shaft* of a party to the suit, title in such party for that purpose and to that extent may be shown, notwithstanding the rule that in suits supporting adverse claims each party must stand on the strength of his own title. *Girard* v. *Carson*, 346

ADVERSE CLAIM. *Continued.*

5. *Equity case supporting adverse.*—The complaint being, in effect, a bill to quiet title as against an adverse claim, and the plaintiff having thus voluntarily invoked the equity jurisdiction of the court, he is in no position to urge, on appeal, that his complaint should have been dismissed because of adequacy of remedy at law, and such an objection comes too late in the appellate tribunal. *Perego* v. *Dodge*, 364

6. *Either at law or in equity.*—A suit supporting an adverse claim required by R. S. §2326, as amended by the act of 1881 referring to the "jury" finding title in neither party is not necessarily an action at law. In a proper case a bill to quiet title lies and if at law the jury trial may be waived. *Id.*

7. *The application and the suit independent proceedings.*—An action in support of an adverse claim is tried in a State Court as a suit brought under the laws of the State and the result of the action as affecting the status of the parties in the land office has no bearing upon the pleadings, practice or jurisdiction. *Altoona Co.* v. *Integral Co.*, 410

8. *That suit was not brought within the thirty days*, as required by act of Congress, is no defense to the action, unless the effect of the delay was to defeat plaintiff's right of possession on the date when suit was brought. *Id.*

9. *The court takes judicial notice* without averment or proof, of how long after a certain event an action pending before it was commenced, the date of such event being averred and admitted in the action. *Id.*

10. *The citizenship of the locator may be proved* without necessity of its having been averred in the complaint. *Id.*

11. *Failure to adverse equivalent to judgment.*—A decision of the land office awarding a patent for a mining claim after due publication of notice is conclusive upon an adverse claimant who has failed to file his claim, except for reasons which a court of equity might allow to be urged against a judgment at law. *Golden R. Co.* v. *Buxton Co.*, 592

12. *Citizenship to be proved.*—In a suit supporting an adverse claim plaintiffs must allege and prove that they are citizens of the United States, or have declared their intention to become such. *Schultz* v. *Allyn*, 649

13. *In such action plaintiff must establish a right in himself*, good not only as against defendant, but as against the United States. *Id.*

See ADVERSE POSSESSION, 1; ALIENS; JURY, 1; RES ADJUDICATA, 2; VERDICT.

ADVERSE POSSESSION.

1. *Adverse possession for the statutory limitation period* prior to the inception of the adverse title, of itself makes title equivalent to location. *Altoona Co.* v. *Integral Co.*, 410

AGENT.

1. *Corporation bound by acts of its officers—Same person agent for two companies.*—Where there was a conflict in the boundaries of the patents for two mining claims issued to separate corporations, the corporation to which the later patent was issued, having failed to adverse the claim of the other company, cannot claim relief in equity, upon the ground of mistake in the boundary, although the person whom it employed to take all necessary proceedings to obtain its patent was also the agent of the other company, it being charged with the knowledge of its agent as to the conflict. *Golden R. Co.* v. *Buxton Co.*, 592

2. *Negligence of corporate agent.*—As a corporation acts only through its officers and agents, it may be divested of its property by the negligence of its agents in failing to adverse an application for a patent for a mining claim. *Id.*

See NEGLIGENCE, 4.

AGRICULTURAL LAND.

1. *Must be mines of known value.*—To prevent a valid agricultural entry there must be a mine of known value at the date of entry. That there had been work done and ore extracted from time to time but no permanent profitable mine developed is not enough. *U. S.* v. *Blackburn*, 684

ALASKA.

1. *The mineral land laws* of the United States were extended to Alaska by the organic act of that territory. *Meydenbauer* v. *Stevens*, 578

See POSSESSION, 1.

ALIENS.

1. *Sole right of government to forfeit from alien.*—A deed of a mining claim by a qualified locator to an alien operates as a transfer of the claim to the grantee, subject to question in regard to his citizenship by the government only. *Manuel* v. *Wulff*, 85

2. *Naturalization relates back.*—In a suit supporting an adverse claim where a party who was an alien at the outset becomes a citizen during the proceedings and before judgment, his disability to take title is thereby removed. *Id.*

ALIENS. *Continued.*

3. *The fact of alienage if raised at the proper time* by the proper person will defeat the application to purchase mineral lands from the government by an alien. *Justice Co.* v. *Lee*, 220

4. *But after patent issued* a third party cannot assert such alienage in the grantee and so defeat the patent. The fact of citizenship is to be conclusively presumed to have been found by the land department. *Id.*

See ADVERSE CLAIM, 3, 10, 12.

ANNUAL LABOR.

1. *Work done on group—Claims must be contiguous.*—Rev. St. § 2324 provides that on all placer mining claims located after a given date and until a patent has been issued, "not less than $100 worth of labor shall be performed or improvements made during each year; but where such claims are held in common, such expenditure may be made upon any one claim." *Held*, that the work required must have been done with a view to prospect or develop the claim; and, in order that work done on one may inure to the benefit of another, held in common with it, the claims must be contiguous. *Gird* v. *California Co.*, 46

2. *The burden of proof to show annual labor not performed is* upon the party claiming forfeiture. Where the court found that no competent evidence was produced to show such work it will be assumed that they put the burden of proof on the wrong party and the finding will not be sustained. *Quigley* v. *Gillett*, 68

3. *Annual labor after owner ousted.*—The owner of a placer mineral claim does not forfeit his right thereto so as to render it subject to relocation by failure to perform the required annual assessment work during the time when adverse possession is held by another, where he commences action for its recovery within the statutory time. *Trevaskis* v. *Peard*, 353

4. *The services of a watchman* will count as annual labor if his services were necessary to protect improvements, otherwise if he was placed there merely to warn prospectors off the claim. *Altoona Co.* v. *Integral Co.* 410

5. *Whether work done on one of a group* of claims was for the benefit of the claims in controversy is a question of fact for the jury. *Id.*

6. *Group claims need not necessarily be contiguous* to allow work on one to count for another. *Id.*

7. *Annual labor on group—Claims must touch.*—The provisions of Rev. St. § 2324, authorizing the necessary work to be done on any one of the several claims held in common, applies only when such claims are contiguous. *Royston* v. *Miller*, 418

ANNUAL LABOR. *Continued.*

8. *Estoppel against co-owner reporting work done.*—A co-owner of several mining claims, who undertakes to do the work necessary to hold such claims, and reports to his co-owners that he has done such work, cannot acquire any interest therein as against his co-owners because of the failure to do such work. *Id.*

9. *No forfeiture in 1893.—No vested interest in penalty.*—Act Nov. 3, 1893 provided that Rev. St. § 2324, as to the doing of labor or making of improvements on a mining claim, should be suspended for the year 1893, and that any failure in that regard should not cause a forfeiture. *Held*, that a co-owner, who had done the necessary work for that year, had no vested right to contribution from his co-owner or to forfeiture in lieu of contribution. *Id.*

10. *Annual labor done on an adjoining claim* having a tendency to develop the claim in controversy will avail. (And work by *stoping* was held properly left to be considered by the jury on this point.) *Taylor* v. *Parenteau*, 534

See ABANDONMENT.

APEX.

1. *Where a vein crosses both side lines* of its survey it cannot be followed on the dip beyond the side lines. *King* v. *Amy Silversmith Co.*, 76

2. *Side and end lines.*—The side lines of the location of a lode claim, under Rev. St. § 2322, are those which run on each side of the vein or lode, distant not more than 300 feet from the middle of such vein. A line in such a location which does not run parallel with the course of the vein, but crosses it, is an end line. *Id.*

3. *When side, become end lines.*—When, in making such a location, the claimant calls the longer lines, which cross the vein, side lines, and the shorter lines, which do not cross it, end lines, this court will disregard, in its decision, the mistake of the locator in the designation of the side and end lines, and will hold the locator to the lines properly designated by him, as it cannot relocate them for him. *Id.*

4. *Where two veins unite on the dip*, the oldest location holds the vein below the plane of union. *Cons. Wyo. Co.* v. *Champion Co.*, 113

5. *Lode leaving after general parallelism to side lines.*—Where a lode leaves both side lines of the patent, yet if it follows more nearly parallel to the side lines than to the end lines it has the right to follow the lode on the dip between the points of departure. (Obiter.) *Id.*

6. *Lode line on diagram of patent.*—Extralateral rights of a locator are determined by the position of the vein in the earth within his boundaries with reference to his end and side lines, and where

APEX. *Continued.*

the patent as in this case contains on its plat a line purporting to give the supposed course of the lode, such theoretical line on the diagram is entitled to no weight. *Id.*

7. *Lode crossing one side line.*—Where a vein enters an end line and continues nearly parallel with the side lines for the greater part of the length of the claim, the owner is not deprived of extralateral rights because the vein crosses a side line before reaching the other end line, but his extralateral rights will extend from the end at which the vein enters to the point at which it crosses the side line. *Id.*

8. *Burden of proof on apex claimant.*—Under Rev. St. § 2322, giving a locator the right to all veins throughout their entire depth, the apexes of which lie within the surface lines of his claim, though in their course downward they extend outside the vertical side lines of the claim, a locator cannot take mineral from the claim of another without showing by a preponderance of evidence that it is a part of a vein having its apex in his own claim. *Id.*

9. *Vein through one end and one side line.*—The fact that the apex of a vein, on its strike, passes through one end line and one side line of the location, does not cause both of these lines to be regarded as end lines, so as to destroy the parallelism, without which there is no right to follow the dip laterally beyond the boundaries of the claim. On the contrary, the owner of such a claim will have a right to follow the dip, within his own original end lines, so far as he holds the outcrop within his location. *Del Monte Co.* v. *New York Co.*, 188

10. *When the course of a mineral vein is across a claim*, instead of in the direction of its length, the side lines of the claim become, in law, the end lines, and the end lines become the side lines. *Last Chance Co.* v. *Tyler Co.*, 205

11. *Rights of prior location on vein across the strike.*—Where a vein is so located as to have extralateral rights, but its dip carries the vein under a prior location which has the right to all its vein within its vertical lines—the prior location of such latter vein defeats the assertion of extralateral rights as to the ore within such vertical lines. *Tyler Co.* v. *Last Chance Co.*, 303

12. *Right of lode leaving one side line.*—When a lode enters an end line of a regularly located mining claim, and runs in its course lengthwise, nearly parallel with the side lines of the claim for the greater part of the length of the claim, the owners of the claim are not deprived of the extralateral rights attached to it because the lode crosses a side line before reaching the other end line, but the extralateral rights will extend from the end at which the lode enters to the point at which it crosses the side line, whether a

APEX. *Continued.*

new end line is regarded as being drawn at that point or not. *Republican Co.* v. *Tyler Co.*, 564

13. *Apex leaving side line.*—When the strike of a vein is parallel with the side lines of the claim, the owner of the apex has the right to follow the vein downward in its dip to any depth, although in so doing he passes beyond the side lines of his claim as located upon the surface into adjoining territory, but it is otherwise when the strike of the vein is across the side lines. *Catron* v. *Old*, 569

14. *Where the vein leaves the same side line twice*, the owner of such mining claim has no extralateral rights. *Id.*

15. *It is to be presumed that the owner of a mining claim is the owner* of all deposits of ore within the side lines of the location, until it shall be shown by a preponderance of the testimony that such deposits are part of a lode having its top or apex within the boundaries of another's claim. *Wakeman* v. *Norton*, 698

16. *One side line and one end line.*—It is error to charge that an apex claimant to justify intrusion into adjoining ground must have a lode whose apex passes through both end lines. *Id.*

17. *Presumption of continuity in favor of extralateral claimant.*—The prima facie presumption that a lode whose course and strike is substantially parallel with, and runs in the same direction as, the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved. *Id.*

See END LINES.

APPROPRIATION.

1. *Notice not followed up.*—One who files notice of appropriation of waters, but does not construct a ditch to divert them, and never takes any of the water till eight or ten years after, when in two or three instances he diverts it in a fugitive manner, by tapping the ditch of another, makes no valid appropriation. *Cardoza* v. *Calkins*, 689

2. *Amicable interference of third parties.*—Efforts of persons having water rights to amicably adjust the claim of another to the use of the waters gives no validity to his claim. *Id.*

3. *Where a ditch notice is allowed in evidence* but is not followed by proof of timely appropriation of the water, it should be stricken out. *Id.*

APPURTENANCES—See DUMP, 1.

ASSAY.

1. *Comparison of assays.*—In a suit to rescind the sale of a silver mine on the ground of fraud perpetrated by defendant by "salting" the samples of ore taken by complainant for assay, it was shown that there was no native silver in the ore of the mine, but every one of thirty samples taken contained from 80 to 90 per cent. of the ore values in the form of powdered silver. The assays were made at different places and by different persons, but all with substantially the same result. *Held*, that the evidence showed that the presence of this powdered silver in the samples could not have been accidental. *Mudsill Co.* v. *Watrous*, 2

2. *Assay value.*—Where by the agreement the mill men were to return a certain per cent. of the "assay value" of gold ore worked in the mill, this meant the standard assay value of gold as known everywhere, and not the value of gold bullion at the place where produced. *Vietti* v. *Nesbitt*, 247

3. *Where a purchaser is allowed to freely select his own specimens* and is misled by his own assays he has no case. *Crocker* v. *Manley*, 485

4. *Assays of samples* or specimens in general run higher than the assays of ore milled in quantities. *Id.*

See CONTRACT, 2; RESCISSION, 1.

ASSIGNMENT—See LEASE.

ASSUMPSIT—See TENANTS IN COMMON, 1.

BOUNDARIES.

1. *Monuments control measurements* and in trespass parol evidence of such monuments is admissible to identify the land conveyed to and claimed by the plaintiff. *Stinchfield* v. *Gillis*, 195

2. *Action of land office as to overlap.*—The question as to the true boundary of a mining claim for which a patent is asked is a question of fact, coming properly within the jurisdiction of the land department; and its action therein is conclusive, in the absence of fraud. *Golden R. Co.* v. *Buxton Co.*, 592

See ESTOPPEL, 4.

BROKER—See VENDOR AND PURCHASER, 2.

BULLION—See ASSAY, 2.

CONFUSION.

1. *Confusion of ore.*—In an action to recover for ore taken under a mistake as to ownership, where it appears that such ore was mingled with ore to which defendant was legitimately entitled, so that plaintiff was entirely unable to separate it, defendant must

CONFUSION. *Continued.*

show how much came from plaintiff's vein and how much from his own, or plaintiff may recover the value of all the ore shown by his own evidence to have been taken out. *St. Clair* v. *Cash G. M. Co.*, 523

2. *Special instruction in such case.*—In an action to recover for ore taken by trespass, and mingled with ore to which defendant was legitimately entitled, where defendant has introduced evidence of work done and ore taken from his own vein, in order to reduce, to the extent of its value, plaintiff's recovery, the jury should be instructed to consider such evidence only so far as it might aid them in determining, if possible, what proportion of the ore came from defendant's vein. *Id.*

CONTRACT.

1. *Right to terminate if prejudicial to good mining.*—A contract by which plaintiffs agreed to mine iron ore from defendant's mine by the caving system gave defendant the right of terminating the contract whenever it should decide that such system of mining was "prejudicial to the future welfare and development of said mine." *Held*, that this gave defendant no right to arbitrarily terminate the contract, and having stopped plaintiffs from continuing the work, without even pretending to have determined that the system would be prejudicial, it was liable in damage for breach of the contract. *Anvil Co.* v. *Humble*, 98

2. *Percentage of iron.*—A contract provided that plaintiff should mine for defendant, at so much per ton, the iron ore contained in the first level of defendant's mine, such ore to contain at least 56 per cent. metallic iron. Subsequently the parties stipulated that the contract should extend to the ore contained in the second and third levels, "with the exception that the merchantable iron ore extracted under this contract shall contain at least 58 per cent. or upwards of metallic iron." *Held*, that the 58 per cent. applied only to the ore in the second and third levels. *Id.*

3. *The parties' own construction* where the language admits of a doubt will be the Court's construction of their contract. *Balfour* v. *Russell*, 202

4. *Ignorance by a party to an instrument of the contents* thereof does not relieve him from its legal effect, in the absence of fraud or misrepresentations. *Royston* v. *Miller*, 418

See EVIDENCE, 5, 6; INTEREST, 1; MEASURE OF DAMAGES, 1; OIL, 7; ORE, 3; PROSPECTING CONTRACT.

CONVEYANCE.

1. *Deed covers all veins within the tract.*—Where a party holding a mining claim under a certain name conveys a parcel of it by

CONVEYANCE. *Continued.*

metes and bounds and further describing the parcel sold by a new name used merely to distinguish the parcel conveyed, the grantee takes all the veins apexing within the area described and no rights remain in the grantor to follow a cross vein into the ground granted. *Stinchfield* v. *Gillis*, 195

See CORPORATIONS, 2; CROSS LODE, 1; DUMP, 1; MINERALS, 2, 3; QUIET TITLE, 4; STATUTE OF FRAUDS.

CORPORATIONS.

1. *Knowledge personal to incorporators—Knowledge personal to officers.*—A corporation is not charged with notice of facts known or acquired by its officer or agent in a transaction in which he acts for himself and not for the company. *Franklin Co.* v. *O'Brien*, 331

2. *Shifting title to corporation.*—An equitable title is not defeated by the fact that the holders of the legal title convey to a corporation of which they were the promoters and organizers and are its directors and only stockholders. In such case the company stands charged with the same equities as existed against its grantors and with the knowledge thereof which they possessed. *Id.*

See ADVERSE CLAIM, 3; AGENT, 1, 2; INSPECTION, 1; PROMOTERS.

COVENANT—See OIL, 10.

CROSS LODE.

1. *No cross lode right reserved.*—Section 2336 U. S. Rev. St. concerning cross lodes has no application when grantor conveys a tract by metes and bounds without reservation. *Stinchfield* v. *Gillis*, 195

DEED—See CONVEYANCE.

DISCOVERY SHAFT.

1. *Where the discovery shaft on a senior claim is patented* as parcel of another claim the claim on which it was sunk becomes void and all its pretensions to seniority are gone by its failure to adverse. *Girard* v. *Carson*, 346

See ADVERSE CLAIM, 4.

DISTRICT RULES.

1. *The rules of miners* where not in conflict with State or Congressional Acts are as binding as if they were a part of the statute itself. *Gird* v. *California Co.*, 45

2. *Local rules not judicially noticed.*—Local rules and regulations of miners, although recognized by the statute, are not sub-

DISTRICT RULES. *Continued.*

jects of judicial notice, but must be presented with the evidence in the case. *Meydenbauer* v. *Stevens*, 578

See LOCATION, 1.

DIP—See APEX.

DITCH—See APPROPRIATION; POSSESSION, 2.

DOWER.

1. *No dower in possessory claim.*—A locator of an unpatented mining claim under the laws of the United States, having only the possessory rights conferred by those laws, has not such an interest in the property as will sustain a claim for dower therein, against the grantee of the husband. *Black* v. *Elkhorn Co.*, 375

DUMP.

1. *Right to dump appurtenant to deed for tunnel.*—The grant of a tunnel right through a specific piece of ground, "together with all and singular the appurtenances thereto belonging," carries with it by implication every incident and appurtenance thereto including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right. *Scheel* v. *Alhambra Co.*, 616

EJECTMENT.

1. *The proof of the prior location of the ground* by third parties as a reservoir site is immaterial to the issue. *Quigley* v. *Gillett*, 68

2. *Proof of ouster.*—If the defendant in ejectment makes any defense other than a disclaimer, proof that he was in possession of the premises at the time of commencement of the action is unnecessary. *Argonaut Co.* v. *Turner*, 556

3. *Title of the United States—Rev. St. U. S. § 910.*—By this section no possessory action shall be affected by the paramount title of the United States, but each case must be adjudged by the law of possession. *Meydenbauer* v. *Stevens*, 579

4. *Ejectment—Mere intruder.*—The maxim that the plaintiff must recover on the strength of his own title does not apply in the case of a naked trespasser or intruder, although the party in possession may have a defective location. In such case the latter's possession alone is sufficient to maintain ejectment. *Id.*

END LINES.

1. *The mining act of 1866* did not require parallelism of end lines, and a lode locator under that act has the right to follow the lode on its dip, and the court will assume such an end line and draw a parallel to it so as to give the location on the dip the full

END LINES. *Continued.*

length it is entitled to on the strike. *Cons. Wyo. Co.* v. *Champion Co.*, 113

2. *One set of end lines—Patent fixes end lines, and not the overlapped location.*—A controversy arising from overlapping locations, after being carried on both before the land office and the courts, was compromised by allowing one of the locations to patent most of the disputed land. A company was then organized, representing both parties to the dispute and the land was conveyed to it. *Held*, that this company could not refer its title to either or both of the contending locations, at its election, so as to give it the right to follow the dip within the end lines of either location at will, but on the contrary, it must derive its rights in this respect solely from the location under which the patent was obtained. *Del Monte Co.* v. *New York Co.*, 188

3. *Right to draw in end line.*—When the outcrop of a vein passes through one end line and one side line of a location, the locator may draw in the other end line to the point of intersection of the vein with the side line, and abandon what lies beyond; and he will then have the same extralateral rights as if the claim had been so located in the first instance. *Tyler Co.* v. *Last Chance Co.*, 303

4. *Where vein departs its real end line.*—Even if the locator does not actually so draw in his end line, and abandon what lies beyond, a new end line will be considered as drawn at that point, and the claim will have the same extralateral rights as if it had been so located in the first instance.

5. *Where the course of a vein is across* a mining claim as located upon the surface instead of lengthwise, the side lines of the location become the end lines, and end lines side lines, so far as lateral rights are concerned, but this does not impair the validity of a patent as to any part of the territory included therein. *Argonaut Co.* v. *Turner*, 556

See APEX.

EQUITY.

1. *Discovery is not, ordinarily, an independent ground of equitable relief*, and where a bill presents no other ground for interference equity will not take jurisdiction merely because discovery is prayed for. *Erskine* v. *Forest Oil Co.*, 297

2. *Court not bound to submit issues.*—Where a case is one of equitable jurisdiction only, the trial court is not bound to submit issues of fact to a jury; and, if it does so, is at liberty to disregard the verdict and findings of the jury. *Perego* v. *Dodge*, 364

3. *Where a party pursues the case as one in equity* he cannot on appeal be heard to say that he has been deprived of his right of trial by jury. *Id.*

EQUITY. *Continued.*

4. *Test to maintain decree in equity.*—A decree in equity will not be reversed for error in admitting or rejecting evidence, where all the circumstances show that the result was not affected thereby. The controlling inquiry is whether there is sufficient competent evidence in the record to sustain the decree. ***Migeon*** v. ***Montana Co.***, 446

See ADVERSE CLAIM, 5, 6; EXHAUSTED MINE, 1; FORFEITURE, 2, 4; INJUNCTION; JURISDICTION, 1, 2; LACHES; PARTITION; QUIET TITLE; RENTS AND ROYALTIES, 1.

ESTOPPEL.

1. *Silence not always assent.*—A person is not estopped by silence to subsequently deny statements made in his presence, when his silence was the result of physical suffering or semi-unconsciousness. *Gowen* v. *Bush*, 434

2. *Failure to make specific objections* to a contract tendered—mere silence in such regard—is no waiver of valid grounds for objection. *Bailey* v. *Bond*, 466

3. *Estoppel in pais.*—To bind one by estoppel in pais from statement or conduct, he must have stated, or led another to believe in, something as a fact, and that other must be ignorant of the contrary, and must rely on it, and act to his injury differently from what he would have done but for such statement or conduct. *Bettman* v. *Harness*, 501

4. *Estoppel by pointing out boundaries.*—A mine owner, who points out to an intending purchaser of the adjoining claim certain monuments as indicating the dividing line, estops himself and his subsequent grantees from denying the truth of such representations after the other party, in reliance thereon, has purchased the adjoining claim. *Schultz* v. *Allyn*, 649

See ANNUAL LABOR, 8; EQUITY, 3; PATENT, 2, 5.

EVIDENCE.

1. *Hypothesis—Motive.*—Analysis of the process of reasoning known as "hypothesis" and consideration of "motive" as an element of proof. *Mudsill Co.* v. *Watrous*, 2

2. *Explaining letter.*—Contractors with a company to work its mine wrote its general manager a letter, stating that the first level of the mine was practically exhausted; but afterwards, in a suit against the company for preventing them from working, claimed loss of profits on ore in that level. *Held*, that the letter did not preclude them from showing the facts, or from testifying that it

EVIDENCE. *Continued.*

was written at the solicitation of the company's superintendent, to accomplish a wrongful purpose on his part. *Anvil Co.* v. *Humble*, 99

3. *Statements by the bookkeeper* of a mining company as to his reasons for refusing to allow a contractor to see and copy railroad weigh bills in his possession, which by the contract were made the evidence of the amount of the contractor's compensation are competent evidence as against the company. *Id.*

4. *Proof of conditions beyond ground in controversy.*—On the question of whether two veins unite in disputed ground it may be shown that their directions outside of as well as within the disputed ground are such that, if continuous, they would meet. *Cons. Wyo. Co.* v. *Champion Co.*, 113

5. *Parol testimony cannot be received to change or vary*, take away from or add to, a written contract in the absence of fraud or mistake. *Woodward* v. *Mitchell*, 158

6. *Parol evidence admitted without objection.*—Where parol evidence of the contents of a written agreement is admitted without objection, no advantage of the fact of its incompetency can be taken afterwards. Under such circumstances the parol evidence is competent to establish what the terms of the contract were. *Vietti* v. *Nesbitt*, 247

7. *Too remote for res gestae.*—Statement made by one of several victims of an accident, three-quarters of an hour after its occurrence, concerning the cause thereof, and the whereabouts at the time of the injured persons, forms no part of the res gestae. *Gowen* v. *Bush*, 434

See ABANDONMENT, 2, 15; ANNUAL LABOR, 2; APEX, 8, 15, 17; APPROPRIATION, 2, 3; ASSAY, 1; BOUNDARIES, 1; DISTRICT RULES, 2; EJECTMENT, 1; FRAUD, 3; KNOWN LODE, 2; LOCATION, 1; LOCATION CERTIFICATE, 2; PATENT, 1; PLACERS, 4.

EXHAUSTED MINE.

1. *No ore found after search.*—A lease of land "for the purpose of exploring for, mining, taking out, and removing therefrom the merchantable iron ore which is or which hereafter may be found on, in, or under said land," at a specified annual rent, to be considered in the adjustment of royalties on ore removed, presupposes the existence of merchantable ore, and if, after reasonable efforts on the part of the lessee, ore is not found in minable quantities, the lease fails, and no rent can be collected. *Blake* v. *Lobb's Estate*, 462

See OIL, 9, 11.

FIXTURES.

1. *Casings in an oil or gas well are trade fixtures*, and become the property of the landowner, if not removed by the lessee during, or within a reasonable time after the expiration of, his lease. *Shellar* v. *Shivers*, 260.

FORFEITURE.

1. *Two parties to forfeiture.*—The clause of forfeiture in an oil lease is for the benefit of the lessor and no act of the lessee can terminate it without the lessor's concurrence—there must be evidence that the lessor had declared the forfeiture. *Bartley* v. *Phillips*, 145

2. *Equitable relief against forfeiture—Time.*—Where time is not stipulated as essential and a forfeiture for nonpayment of money, or other matter that admits of accurate and full compensation, is provided as a mere penalty whose object is to enforce performance of another and principal obligation, equity will relieve against it, and will not permit it to be used for a different and inequitable purpose. *Lynch* v. *Versailles Co.*, 149

3. *Where an oil lease is operated steadily* and rent paid from year to year a few days' inadvertent delay to pay the rent will not sustain a forfeiture. *Id.*

4. *Where equity would have relieved against forfeiture*, in an action at law the verdict should be against forfeiture. *Id.*

5. *A lessor waives his forfeiture* when after pay day he allows his lessee to make, to his knowledge and under his observation, considerable expenditures. *Id.*

6. *Lessor must elect to forfeit.*—A provision in an oil and gas lease that a failure to complete an oil well on the leased premises, or make payment of a specified rental, shall render the lease null and void, is not effective in behalf of the lessee unless the lessor so elects. *Edmonds* v. *Mounsey*, 384

7. *Lessor alone can forfeit.*—The clause of forfeiture or termination of the estate usually incorporated in oil and gas leases in this state is for the benefit of the lessor, and as against him no act of the lessee can work a forfeiture without his concurrence. *Bartley* v. *Phillips*, 542

8. *Parties who lease or buy oil or gas lands, with a term apparently outstanding*, without inquiry of the lessee, and without the exercise of the lessor's power to forfeit, take the risk of the fact of abandonment of the first lease as the facts may be found by the jury. *Id.*

9. *Facts of the case.*—Defendant leased oil and gas lands from

FORFEITURE. *Continued.*

the owner. He had notice of the fact that there was an outstanding lease of ten years to plaintiffs, only three years of which had expired. The grantor of the lessor of defendant refused in his deed to assert a forfeiture of the first lease. Defendant made no inquiry of the plaintiffs as to whether their lease had been terminated. *Held*, (1) that the defendant had sufficient notice to put upon him the duty of inquiry; (2) that it was a question for the jury to determine whether there had been an abandonment of the first lease. *Id.*

10. *Rent payable until lessor declares forfeiture.*—In an oil lease for 20 years, which provides that, if a well is not commenced within three months, the lessee shall thereafter pay a specified monthly sum until work is commenced, a clause declaring that in no case shall the commencing of the well be delayed beyond six months, and that, if no well is begun within that term, the lease shall be forfeited, is for the benefit of the lessor, and, until he elects to enforce it, the lessee's liability to pay rent continues. *Mathews* v. *Peoples Gas Co.*, 552

11. *Lessor building on surface.*—The act of the lessor of oil lands in entering on the premises, and erecting a building in such a location as not to interfere with the future operations of a well the site of which was then marked with a stake, was not a declaration of forfeiture.

See ABANDONMENT; ANNUAL LABOR, 9; ALIENS; LEASE; MINING CLAIM, 2.

FRAUD.

1. *Statement as to ore values accompanied by tampering.*—A bill for the rescission of the purchase of a silver mine on the ground of fraud alleged that defendant represented that the ore therein contained a certain average of pure silver, making it very valuable, whereas in fact the average was so low that it was worthless; and that defendant had "salted" the samples which complainant took from the mine, and upon the faith of which analysis the purchase was made, by fraudulently mixing native silver therewith. *Held*, that, where the latter allegation is sustained, defendant cannot shelter himself behind the plea that his representations were mere expressions of opinion as to the value of the mine. *Mudsill Co.* v. *Watrous*, 1

2. *Salting ore in previous instances.*—In a suit to rescind on the ground of fraud perpetrated by defendant by "salting" samples of ore, upon the assay of which complainant was induced to purchase, it is competent to show that defendant had "salted" samples used

FRAUD. *Continued.*

in prior negotiations with other persons for the sale of the same mine. *Id.*

3. *Sufficient proof of salting.*—In a suit to rescind the sale of a silver mine on the ground of defendant's fraud in "salting" the samples by means of which complainant was induced to purchase, it was shown that defendant had a substantial pecuniary interest in effecting the sale; that some of the samples were tested immediately after being taken from the mine, in which operation they were put into the hopper of a crusher by complainant, and were received by defendant as they came out, at a point which was out of complainant's sight, while the samples not then tested remained for some days in defendant's exclusive possession and control; that the "salting" was done with powdered metallic silver, such as was easily procurable in the market, and which might have been introduced into the samples with a syringe without breaking the seals of the bags; and that, after the presence of metallic silver in the samples was accidentally discovered, defendant opposed the erection of a mill adapted to its separation, he having an interest in the company for which complainant had bought the mine, and knowing that there was no native silver in the ore. *Held*, that the evidence showed that the "salting" was done by defendant. *Id.*

4. *Constituents of actionable fraud.*—To constitute fraud, false representations must relate to a material fact, and be made with a knowledge of their falsity and for the purpose of inducing the other party to act thereon, and such other party must actually act to his injury, in the reasonable belief that the representations are true. *Crocker* v. *Manley*, 485

5. *Opinions and anticipations not representations of facts.*—Statements by a mine owner made to induce another to purchase stock therein, that the mine was rich in silver, would pay twenty to one hundred per cent. dividends, and that there was enough ore on the dump at the mine to pay the par value of the stock, are matters of opinion only, and though false do not constitute fraud. *Id.*

6. *Where a buyer has information about value which rightfully belongs to the seller* and he conceals such information from the seller, the parties are considered as dealing the same as where a relation of trust and confidence exists and the rule as to the effect of misrepresentation in such cases applies. *Edelman* v. *Latshaw*, 608

7. *Letter addressed to deceased stockholder.*—A letter or the contents of a letter addressed to a holder of stock containing information as to its value after such stock has been sold is rightfully the property of the present holder. *Id.*

FRAUD. *Continued.*

8. *Facts of the case—Wanted to keep stock in the family.*—An executor sold some mining stock, considered worthless, belonging to his father's estate, for a nominal sum. Thereafter a letter was received by him, directed to the decedent, offering $2 per share for the stock. The executor repurchased it from the purchaser, concealing the receipt and contents of the letter, stating in terms that the stock had no value and that he bought it back because it had been in his father's name so long. *Held*, that the executor was liable to the purchaser for the full value of the stock. *Id.*

See CONTRACT, 4; RESCISSION; TRUSTS, 1.

INJUNCTION.

1. *Enjoined time of lessee made good.*—It being agreed that such lease should "continue and be in force for five years from the date thereof," and the second party, having commenced operations in good faith to drill for oil in ample time to complete a well within said term of five years, was wrongfully enjoined by the lessor, and the injunction kept alive until after the expiration of the term of five years. *Held*, that the second party is entitled at the close of the litigation to as much time in which to perform his contract as still remained of his term when he was first enjoined. *Stahl* v. *Van Vleck*, 231

2. *Destructive trespass not always enjoinable.*—In Pennsylvania, equity has no jurisdiction of a bill to restrain the operation of oil wells, or the taking of oil therefrom, where the complainant's title is purely legal, the respondent is solvent, and there are neither complicated accounts nor such irreparable injury as warrants interference by injunction. *Erskine* v. *Forest Oil Co.*, 297

3. *Adequate remedy at law.*—The substantial purpose of such a bill being to recover possession of the wells, the remedy by ejectment, aided by writ of estrepement under the state statutes, is full and adequate. *Id.*

4. *Full relief in equity.*—Equity has jurisdiction, by injunction, to prevent acts of irreparable injury to land, even though there is controversy as to title between the parties, and having jurisdiction on that ground, will go on to give full relief, though in so doing it be necessary to decide between two adverse titles. *Bettman* v. *Harness*, 500

5. *Oil pumping irreparable injury.*—The unlawful extraction of petroleum oil or gas from land, they being part of the land, is an act of irreparable injury. Equity will enjoin it. *Id.*

6. *A preliminary injunction must not do what can only be done after full hearing* by final decree, as by changing the possession of

INJUNCTION. *Continued.*

realty, or depriving one in possession of its benefits, in any other respect than as to the wrongful act proper to be enjoined; the proper purpose of such injunction being to preserve the present status until a full hearing on the merits shall be had. An injunction as to so much of it as is excessive is void, and ought to be modified on motion. *Id.*

7. *The drilling of a gas well within 152 feet of a dwelling house* will not be enjoined on account of the noise, pollution of the air, danger from fire or explosion that would result from operating the well, or on account of water or oil from the well, where it is not shown with certainty that water, oil, or gas will be found, and it is not shown that the gas well could not be operated in such a manner as to avoid the injuries apprehended. *Windfall Co.* v. *Patterson*, 674

See ACCOUNT.

INSPECTION.

1. *Inspection allowed to stockholder.*—A petition by a stockholder and bondholder of an insolvent company to inspect a mine either in person or by agent, with a view to having the receiver in charge thereof removed, is in the nature of a motion made for the production, by parties, of books or writings in their possession, or motion for inspection of writings or examination of parties before trial, and being made by a party in interest, and entitled to the knowledge sought, will be granted by a federal court. *Henszey* v. *Langdon-Henszey Co.*, 614

2. *Such inspector is the private agent* of the party for whom he acts and by his appointment does not in any way become officially connected with the court or case. *Id.*

INSTRUCTIONS.

1. *Stating to the jury what the issue is*, is of itself a proper instruction; and if further instructions were erroneously given or refused the complaining party must produce the record and disclose the error. *Bennett* v. *Harkrader*, 224

2. *A joint motion* for new trial by all the defendants, on the ground that the verdict is excessive, is properly denied unless the verdict was wrong as to all of the defendants. *Edmonds* v. *Mounsey*, 384

3. *Error in a single instruction* is not material where the charge as a whole is both correct and intelligible. *Taylor* v. *Parenteau*, 534

See NEW TRIAL, 1.

INTEREST.

1. *Interest*, as such, can only be collected where authorized by statute. In an action upon contract, where there has been no settlement and the balance due upon the contract is uncertain and unascertained, interest cannot be collected. *Vietti* v. *Nesbitt*, 247

JURISDICTION.

1. *Equity jurisdiction covers whole case.*—A court of equity having acquired jurisdiction of a matter for one purpose, may determine the rights of the parties before it for all purposes. *United Co.* v. *Canon City Co.*, 639

2. *Test of proper tribunal.*—The question of whether an issue of fact should be tried by a jury or by the court is not to be determined by the nature of the issue, but by the character of the action in which such issue is joined. *Id.*

JURY.

1. *The right to a jury may be waived by the mere trial* of the case without any demand for a jury. *Perego* v. *Dodge*, 364

KNOWN LODE.

1. *A known lode such as to be excepted* from the grant of a placer patent must have been clearly ascertained at date of application and be of such extent as to render the land more valuable on that account and to justify its exploitation. *Casey* v. *Thieviege*, 624

2. *The burden of proof* is on the party alleging the existence of the known lode. *Id.*

3. *Facts of the case.*—Evidence that at the date of an application for a placer patent, made after the property had been worked as a placer mine for several years, there were some surface indications of veins of mineral-bearing rock, but that they had not been examined with a definite view to working them, and that no assays had been made, and testimony of a witness who had sunk on some of them that they "played out," and of another witness that there were no veins with clearly-defined walls, negatives a claim that there were "known" veins, within Rev. St. U. S. § 2333, excluding such veins from the operation of the placer patent. *Id.*

See AGRICULTURAL LAND, 1; PLACERS, 2-4.

LACHES.

1. *Laches is a good defense against the government* where twelve years have elapsed and innocent purchasers have acquired interests in the land. *U. S.* v. *Blackburn*, 684

LAND OFFICE.

1. *The courts will not interfere with the land office* pending an application for patent, to control its action upon such matters where it has sole jurisdiction. *Justice Co.* v. *Lee*, 220

See ADVERSE CLAIM, 1; BOUNDARIES, 2; PATENT, 5.

LEASE.

1. *Surrender by parol.*—Where the lessees under an oil and gas lease have an absolute right to rescind the lease at any time, and such lessees never enter into possession of the demised premises, the rights and privileges under the lease may be surrendered by parol. *Hooks* v. *Forst*, 139

2. *Declining to pay further installments of rent* and telling the lessor to go ahead and let it to whoever he pleased and that the lease would be returned although it was never formally redelivered is sufficient proof of surrender. *Id.*

3. *The holders of an unworked oil lease are not tenants in common* and the acts of two out of three in making surrender of the lease with the knowledge of the third bound them all. *Id.*

4. *Bound by associate's act.*—Where, by the terms of an oil lease to three persons jointly, the lessees have the right to surrender the lease by parol, the third is bound by the declarations and acts of the other two respecting such surrender. *Id.*

5. *Working other oil wells in the vicinity* and difficulties occasioned by want of railroad facilities are no excuse for failure to comply with express covenant to begin work within a specified time. *Woodward* v. *Mitchell*, 158

6. *Construction as to length of term.*—An oil lease, the term of which is for "three years, or as much longer thereafter as oil or gas might be found in paying quantities," extends only for three years, unless gas or oil is found in paying quantities before their expiration. *Shellar* v. *Shivers*, 260

7. *"At any time."*—Where an oil lease provides that it is to continue for a term of three years, unless oil or gas is found in paying quantities before their expiration, and in that event as long as the productiveness of the well lasts, the words "at any time" in one of its clauses, giving the lessee "the right * * * to remove any or all machinery," refer to that part of the terms which is dependent upon oil or gas being found in paying quantities. *Id.*

8. *Inconsistent positions.*—One cannot claim profits under a lease made by a firm, as a partner therein, and at the same time repudiate the lease because not joined in or assented to by him. *Enterprise Co.* v. *National Co.*, 312

9. *Lessee lured to delay by landlord.*—The lessor in an oil and gas lease will not be permitted to enforce a forfeiture of the lease

LEASE. *Continued.*

for a delay of one day in the payment of rental, where by his acts and declarations he has lured the lessee into the belief that a forfeiture would not be enforced for so short a delay. *Steiner* v. *Marks*, 320

10. *Jury question.*—Whether lessor's acts were such as to justify the lessee in believing that he waived strict performance is a question which should have been left to the jury on the facts. *Id.*

11. *Facts of the case.*—Where the lessor on one pay day told the lessee that he might as well have waited till tomorrow and on another occasion slipped away while lessee was going a short distance to get the money—he cannot be allowed to enforce a forfeiture for a single day's delay. *Id.*

12. *No surrender during current year.*—When a tenant having that privilege desires to surrender he must give notice before he enters on the year intended to be surrendered. *Double* v. *Union Co.*, 327

13. *Lessee must notify, to terminate.*—An oil and gas lease was to terminate by its own limitation two years from its date; after that the lease was to continue "as much longer as oil and gas is found in paying quantities therein * * * and should any well produce gas in sufficient quantities to justify marketing, the lessor shall be paid at the rate of two hundred dollars per year for such well so long as the gas therefrom is sold." *Held*, that after the rental clause became operative by the finding of gas in paying quantities, the lessee could not terminate without giving notice to the lessor of his intention to do so. *Id.*

14. *The mere cessation of the use of gas* from the well did not terminate the lease of its own force and relieve the lessee from any duty to the lessor. *Id.*

15. *Oil lease akin to sale of land.*—An oil lease, investing the lessee with the right to remove all the oil in place in the premises in consideration of his giving the lessors a certain percentum thereof, is in legal effect a sale of a portion of the land, and the proceeds represent the respective interests of the lessors in the premises. *Blakley* v. *Marshall*, 350

16. *Assignee bound.*—The assignees of a natural gas and oil lease are bound by their acceptance of such lease, to make good the covenants contained in the lease to pay rent, and such obligations are not postponed until actual entry upon the land. *Edmonds* v. *Mounsey*, 384

17. *Covenants to pay royalties run with the land* and in a suit by a lessor of a natural gas lease, against an assignee of such lease, it is not necessary to plead an assumption thereof by such assignee, nor is such transaction affected by the statute of frauds. *Id.*

LEASE. *Continued.*

18. *Back rent—Surrender.*—A condition in a lease that a surrender thereof by lessee should satisfy all damages between the parties thereto, applies to future rentals and not to rentals already accrued. *Id.*

19. *One tenant in common* of a lease cannot, without the consent of his co-tenants, bind their interests by a surrender of such lease. *Id.*

20. *Conveyance is eviction.*—An absolute conveyance of oil lands by the lessor, without reserving the lessee's right of entry to drill for oil, is a constructive eviction, which terminates the lessee's liability for rent. *Mathews* v. *Peo. Gas Co.*, 552

See FIXTURES, 1; FORFEITURE; INJUNCTION, 1; MARRIED WOMAN; OIL; QUIET TITLE, 2; RENTS AND ROYALTIES; TENDER, 1; TRESPASS, 1.

LOCATION.

1. *After lapse of time* sufficient to have accounted for their loss it may be presumed that monuments required by district rules were of the dimensions required by such rules. *Gird* v. *California Co.*, 45

2. *The fact that ground is rough* and mountainous does not relieve the locator from the duty of placing such monuments that the claim may be readily traced. *Id.*

3. *The location may be made in the name of another* not the actual locator and such person becomes vested with the legal title to the claim. *Moore* v. *Hamerstag*, 256

4. *Location completed by new associates with change of name.*—One N. discovered a mineral bearing lode, and posted on the spot a notice claiming the right to locate 1,500 feet on the lode and 300 feet on each side thereof, naming it the "R. J. Lode," and also claiming the right to have 20 days in which to complete his boundary monuments. He afterwards went to the premises to mark the boundaries, but was prevented by sickness, but within 20 days he agreed with three other persons to give them half the claim if they would complete the location, which they did by setting up the monuments and posting a location notice, describing the same, in which the claim was called the "R. J. Gold, Silver, and Nickel Quartz Mining Claim." *Held*, that the location made by N.'s associates was a completion of the claim made by N., notwithstanding the addition of descriptive terms to the name of the claim in the notice posted by them. *Doe* v. *Waterloo Co.*, 265

5. *The posting of the notice upon a single stake* on the claim by the original discoverer amounted only to notice of discovery and was not in itself a complete location. *Id.*

LOCATION. *Continued.*

6. *Discoverer taking in associates before location.*—The original discoverer had a right to transfer by parol an interest in his right to locate his claim to his associates, and his doing so and permitting them to complete the location was not an abandonment of such right. *Id.*

7. *Reasonable time to perfect location.*—The discoverer of a mineral vein should have a reasonable time after his discovery to complete his location, the length of time depending on the character of the ground, the means of marking it, and the ability to ascertain the course or strike of the vein. In this case 20 days was not an unreasonable time, the vein being situated on a rough mountain side, the dip not exposed, and 1,000 feet of the vein covered by slide. *Id.*

8. *Chisel mark instead of corner post.*—The statute requires that the surface boundaries of a mining claim shall, except under specified circumstances, be marked by six substantial posts hewed or marked on the sides which are in toward the claim, sunk in the ground,—one at each corner and one at the center of each side line. The cutting of an initial letter into a solid rock at the corner of the claim or at a given distance therefrom is not equivalent to the sinking of a post in the ground, or, where that cannot be done by reason of bed rock, planting one in a pile of stones. *Taylor* v. *Parenteau*, 534

9. *The location of a width greater than the legal distance* allowed on either side of the crevice makes the location void as to the ground embraced in the excess. *Id.*

10. *Dimensions and form of lode claim.*—Under the federal statute a lode claim cannot exceed 1,500 feet in length by 600 feet in width, and should be in the form of a parallelogram having its side lines equidistant from the center of the lode with end lines parallel to each other. *Meydenbauer* v. *Stevens*, 578

11. *Distinct marking the only statutory requirement.*—In locating a lode claim all that the statute requires is that the location shall be distinctly marked on the ground so that its boundaries can be readily traced. *Id.*

12. *Whether any markings have been made*, and whether they are such that the boundaries of the location can be readily traced, are questions of fact. *Id.*

13. *Prior location.*—The effect of a valid location is to segregate from the public lands the ground located, and the prior location gives the prior and better right. *Id.*

14. *A valid location vests in the locator the exclusive right* of possession and enjoyment of the ground located, together with all lodes therein. *Id.*

See DISCOVERY SHAFT; PATENT, 4; TUNNELS, 4.

LOCATION CERTIFICATE.

1. *Government corners and subdivisions as calls.*—A notice of location of a mining claim, required by rules of the mining district, referred to subdivisions of a United States survey for the boundaries of a claim. It was shown that a surveyor had been deputized to make this survey, and that he returned field notes and a map to the land office, which map was approved by the land department; but that the commissioner, upon information tending to show that the survey was not made in the field, suspended his approval, and ordered an investigation. *Held*, that the notice was sufficient, for the map may be referred to for a description of the claim, whatever may be the ultimate fate of the survey. *Gird* v. *California Co.*, 45

2. *Certificate admissible though defective.*—A location certificate however defective in form is under the above act admissible in evidence to show when possession was taken and to point out the property which was taken possession of and (arguendo) should be admissible for such purposes everywhere. *Bennett* v. *Harkrader*, 224

3. *Description binding.*—The description of the location as shown by the record ordinarily will bind the locator as to the locus of the claim. *Meydenbauer* v. *Stevens*, 579

4. *Monuments control distances and courses.*—But where the distances and courses set out in the description as recorded vary from the monuments or markings made on the ground, the latter prevail, and will determine the locus of the claim. *Id.*

See LOCATION; LOCATION NOTICE; RECORD; TUNNELS, 5.

LOCATION NOTICE.

1. *Variance between notice and record.*—Where a district rule requires a certain notice to be posted on the claim and to have a copy of such notice recorded a slight variance between the notice posted and the notice recorded is not material. *Gird* v. *California Co.*, 45

2. *Distinction between notice and record.*—A record is not required by the Congressional act, but if required by state law or district rule must contain a sufficient description, and from the nature of their respective offices the posted notice is not supposed to be as specific as the record or location certificate. *Id.*

3. *Sufficient posting of notice.*—A notice of location of a mining claim, required by rules of the district to be posted on the claim, was put in a tin can, which was placed on a shelf in a rock mound on the claim more than two feet high, the corners of the claim being marked by similar mounds. *Held*, that this was a sufficient posting. *Id.*

4. *Place of posting.*—It is not essential that the notice be posted on the actual outcrop of the vein. *Doe* v. *Waterloo Co.*, 265

LOCATION NOTICE. *Continued.*

5. *No notice of location is required by the statute*, but when the same is posted on the ground it may be considered as a marking to aid in tracing the boundaries of the location. *Meydenbauer* v. *Stevens*, 579

6. *Record as notice.*—When a notice of location contains a description of the claim, and is recorded, it operates as constructive notice that the locator claims the ground described. *Id.*

LODE.

1. *Two walls held necessary.*—To constitute a vein it is not necessary that there be a clean fissure, filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form, and be well-defined, with hanging and foot walls. *Cons. Wyoming Co.* v. *Champion Co.*, 113

2. *A lode is a zone, belt or body of quartz* or other rock lodged in the earth's crust and presenting two essential characteristics, viz.: (1) It must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute. *Meydenbauer* v. *Stevens*, 578

3. *The finding of such a belt, zone, or body is a discovery* within the meaning of the statute, and will authorize the location of a lode claim. *Id.*

See LOCATION.

MARRIED WOMAN.

1. *Wife's non-joinder in lease.*—Where the husband signed a lease and it afterwards appearing that the wife had an interest in the land and the non-procurement of her signature to the lease was the lessee's fault, her outstanding interest is no defense to a suit by the husband for the money. *Kunkle* v. *Peoples Co.*, 153

2. *Facts of the case.*—In an oil and gas lease, granting the lessee the exclusive right to take oil and gas from the land for ten years, the lessee covenanted to sink a well within six months, or pay the lessor $500, and also to pay $130 yearly rent until the well was sunk; the right to occupy the land being reserved in the lessor. At the end of the six months the lessor demanded the $630, the lessee having done nothing to develop the land, and at the time told the lessee that his wife owned an interest in the land. The lessee refused to pay the rent, and insisted on retaining the lease until the wife signed it, but never offered it to her for her signature. The wife made no objections to the lease. The lessee then offered to surrender the lease on condition that the lessor release him from all claims, and, on his refusal to do so, retained the

MARRIED WOMAN. *Continued.*

lease for a year before surrendering it. *Held*, that the fact that the lessor did not have the sole title was no defense in an action by him for the $630. *Id.*

MASTER AND SERVANT.

1. *Neglect to warn employees.*—If laborers engaged in hazardous occupations are not informed of the accompanying dangers by their employers, and they remain in ignorance of the dangers, and suffer in consequence, the employers are chargeable for the injuries sustained. *Mather* v. *Rillston*, 165

2. *Inspector not a fellow servant.*—When a miner is charged with the duty of going through the mine from time to time and inspecting it, and seeing whether it is free from gas, he is discharging a personal duty of the master, and while thus engaged is not a fellow servant of the other miners. *Gowen* v. *Bush*, 434

See NEGLIGENCE.

MEASURE OF DAMAGES.

1. *Prospective profits in mining ore from a certain level* at so much per ton are not conjectural and speculative, so as to prevent recovery, when the evidence shows the cost of past mining, the condition in which the mine was left, and, while not showing with certainty the amount of ore remaining in the level, is yet sufficient to enable the jury to make a fair and reasonable finding in regard thereto. *Anvil Co.* v. *Humble*, 98

2. *Loss of both eyes.*—Plaintiff, 24 years of age, employed in handling dynamite, was injured by an explosion of dynamite, which destroyed his eyes, and inflicted other severe injuries, whereby he was deprived of all means of earning a livelihood. *Held*, that a verdict for $10,000, was a moderate compensation. *Mather* v. *Rillston*, 165

3. *Question of nominal damages.*—It is error to instruct a jury to give nominal damages where plaintiff proves the trespass and the amount depends (among other things) on the credence given to defendant's testimony, showing the cost of mining to be equal to the ore values taken—although such evidence of the defendant is wholly uncontradicted. *St. Clair* v. *Cash G. M. Co.*, 523

4. *The only cost of mining which trespassers are allowed to deduct* from the value of the ore is "the actual expense of taking the ore out;" with tramming and hoisting. *Id.*

5. *The measure of damage depends on the good or bad faith* under which the ore was taken: The distinction between the two classes of cases stated. *Id.*

6. *Where a locator works into a patented claim* he is liable to

MEASURE OF DAMAGES. *Continued.*

the highest limit of recovery unless able to show honesty of purpose and good faith. *Id.*

7. *In case of willful trespass.* in the mining of coal, the measure of damages is the value of the coal mined at the time and place of its severance from the realty. If the trespass was not willful but innocent in character, it is that value, less the amount which the trespasser by his labor and expense had added thereto. *United Co.* v. *Canon City Co.*, 639

See CONFUSION, 1, 2.

MINERALS.

1. *Granite is not a mineral ore* in either the popular or the scientific sense. *Armstrong* v. *Lake Champlain Co.*, 279

2. *Local meaning of the word "minerals."*—That certain persons understood that the word did not include granite, but only ores containing metals, with no evidence of transactions based on such meaning, is no proof of a local usage, if indeed such usage, if proved, would control the interpretation. *Id.*

3. *Construed with context.*—Though the words "minerals and ores" in a deed standing alone, would include granite, where the surface rights granted are only "sufficient land to erect suitable buildings for machinery and other buildings necessary and usual in mining and raising ores," they will be *held* to include only minerals obtained by underground working. *Id.*

See ORE.

MINING CLAIM.

1. *Legislative grant.*—The exclusive right of possession conferred by the mining act of Congress to the locator is in the nature of a legislative grant of an interest in land. *Moore* v. *Hamerstag*, 256

2. *Possessory rights in mining claims may be divested* (1) by sale or gift, (2) by forfeiture, or (3) by abandonment. *Harkrader* v. *Carroll*, 474

MISTAKE.

See EXHAUSTED MINE.

NATURAL GAS.

See FORFEITURE; INJUNCTION, 7; LEASE, 13, 14; NUISANCE, 2; OIL; TENANT FOR LIFE.

NATURALIZATION.

See ALIENS.

NEGLIGENCE.

1. *Neglect of precautions.*—In all occupations attended with great and unusual danger there must be used all appliances readily attainable known to science for the prevention of accidents, and the neglect to provide such readily attainable appliances is proof of culpable negligence. *Mather* v. *Rillston*, 165

2. *Careless storage of dynamite.*—Plaintiff was employed by defendants in handling dynamite and fulminating caps, kept in an engine house, where they were in continuous danger of explosion from great heat and constant jarring and their confused and disorderly position; but defendants did nothing to lessen the heat or jarring, nor did they inform plaintiff of the danger incurred in handling the dynamite and caps or of the danger of explosion from heat or concussion, although he was ignorant thereof. *Held*, that defendants were guilty of negligence and therefore liable for injuries to plaintiff from an explosion of the caps and dynamite. 44 Fed. 743, affirmed. *Id.*

3. *No contributory negligence.*—Under such circumstances, plaintiff, having no knowledge of the special dangers attending his work, and not being informed thereof by defendants, could not be charged with contributory negligence. *Id.*

4. *Assurance of safety by agent.*—Plaintiff was induced by an agent of the defendant to come from another state, and take service in defendant's coal mine. The agent represented that the mine was free from explosive gas and in every way safe. Two or three days after plaintiff began work an explosion occurred, by which he was seriously injured. *Held*, that the representations made by the agent touching the condition of the mine were within the apparent scope of his authority, and admissible against the employer, though made without express authority. *Gowen* v. *Bush*, 433

See AGENT, 2; MASTER AND SERVANT; MEASURE OF DAMAGES, 2.

NEW TRIAL.

1. *Too general exception to instructions.*—A motion for a new trial on the ground of error in giving several instructions is properly denied unless all the instructions were erroneous. *Edmonds* v. *Mounsey*, 384

NON-SUIT.

1. *A non-suit is premature* when based on a fact which could not appear except as part of the defendant's evidence. *Bartley* v. *Phillips*, 145

NOTICE.

See APPROPRIATION, 1, 3; CORPORATIONS, 1; LOCATION NOTICE.

NUISANCE.

1. *A business which is a nuisance per se*, as also one that is so conducted as to become an actual nuisance, will be enjoined; but a business which merely threatens to become a nuisance will be enjoined only where the court is satisfied that the threatened nuisance is inevitable. *Windfall Co.* v. *Patterson*, 674

2. *A gas well sunk to supply fuel* for a manufacturing plant is not *per se* a nuisance. *Id.*

See INJUNCTION, 7.

OIL.

1. *The peculiarities of oil and gas as flowing minerals considered* and the power of one well to drain or destroy another and the effect of water to kill a well considered—with the holding that these incidents were not sufficient to make an exception to the rule that the claims must be contiguous for one to be aided by work done on another. *Gird* v. *California Co.*, 45

2. *Owing to the vagrant character of oil and gas*, a lease of these substances partake of the character of a lease for general tillage, rather than that of a lease for mining or quarrying the solid minerals. *Wettengel* v. *Gormley*, 93

3. *Well sunk within the reservation.*—Where the lease reserves a certain acreage within which no well is to be sunk but the lessee with the lessor's consent sinks a well within the reserve such well is entitled to all the rights of any well sunk outside the reservation. *Balfour* v. *Russell*, 202

4. *Selection of tract.*—A party of the first part, being the owner of three adjoining tracts of land, each containing forty acres, leased one acre thereof, to be designated by himself, to a party of the second part and in the lease it was "agreed on the part of the party of the first part that if oil or gas be obtained by the second party or assigns, in or under the provisions of this contract, upon said tract, or on lands adjoining the same premises of which the foregoing one acre described embraces a part, said second party shall have the right to operate forty acres of the balance of said premises on the same terms as above." *Held*, that the forty-acre tract out of which the one acre was thereafter selected by party of the first part is the forty acres to be operated under the contract. *Walsh* v. *Ringer*, 2 Ohio 328. *Cunningham* v. *Harper*, Wright 366, and *Hay* v. *Storrs*, Id. 711, followed and approved. *Stahl* v. *Van Vleck*, 231

5. *Sinking test well good consideration.*—In said contract it was further "agreed that, if second party or their assigns do not commence a test oil or gas well at Rising Sun or vicinity in ninety days, this lease to be void." *Held*, that a test well at that place

OIL. *Continued.*

having been commenced and completed in ninety days, whereby the existence of oil at that point was ascertained, such performance supplied a sufficient consideration for the contract of lease, even though the test well was immediately plugged and casing withdrawn. *Id.*

6. *No second selection.*—The party of the first part having selected the one acre upon which such well was to be drilled, and the second party having acted thereon, the first party is bound thereby, and has no right to make a second selection. *Id.*

7. *The sudden fluctuation* in the value of oil leases makes time of the essence of all contracts concerning their sale. *Kelly* v. *Marshall*, 317

8. *Facts of the case—Commissions.*—Plaintiff secured the right to sell on commission an oil lease at a fixed price. At his instance the price was reduced a number of times. His time was limited to a certain day. He failed to secure an offer to the limit. Shortly afterwards the owner sold to the same party with whom plaintiff had been negotiating. *Held*, that plaintiff had no claim for commission. *Id.*

9. *No rent after well exhausted.*—Under a lease for a term of years, "or so long as oil or gas is found on the premises," providing for the payment of a specified rental "each year in advance for every well from which gas is used off the premises," the lessee is liable only so long as he uses the gas; and upon the failure of the well, or if it becomes impracticable to use the gas therefrom, the lessee is released from all liability. *Indianapolis Co.* v. *Teters*, 391

10. *Implied covenant to get all oil possible though not contracted for.*—A lessee was bound to sink one well which he did. But there were producing wells on two sides of the demised tract. The court hold that it is his duty to sink more wells to prevent the wells on the adjoining tracts from draining the oil under the demised tract. If he refuse the court sets him apart the territory which in their opinion belongs to the one well which he has sunk and compels him to surrender the remaining territory to the lessor. *Kleppner* v. *Lemon*, 404

11. *No rental on exhausted well.*—Where a lease provided for an annual rental for each well after gas was found in paying quantities such rent ceases upon the exhaustion and abandonment of such well. *Williams* v. *Guffy*, 478

12. *Construction of lease.*—A lease for oil and gas contains the clause, "To have and to hold the said premises unto said party of the second part during and until the full term of two years, and as much longer as oil or gas is found in paying quantities thereon,

OIL. *Continued.*

or the rental paid thereon," and provides for a rent of one-eighth of the oil, and $250 per year for gas, and has a clause reading: "Operations shall be commenced and one well completed within one month, and, in case of failure to complete one well within such time, the party of the second part agrees to pay to the parties of the first part, for such delay, fifteen dollars per month in advance after said time for completing such well as above specified, and the parties of the first part agree to accept such sum as a full consideration and payment for such delay until one well shall be completed; and a failure to complete one well or to make such payments for such delay is to render this lease null and void at the option of the lessor." The lessee having failed to begin operations within the two years, has no right to continue the lease by payment of $15 per month, but the lease is ended. *Bettman* v. *Harness*, 501

13. *The words "or" and "and"* in a contract will be changed and read as "and" and "or" where it is plain they were so intended. *Id.*

See FIXTURES, 1; FORFEITURE; INJUNCTION, 5; LEASE; TENANT FOR LIFE.

ORE.

1. *Ore* "in sight" means ore blocked out and exposed on at least two sides. *Mudsill Co.* v. *Watrous*, 1

2. *Mode of testing average values of ore* by quartering samples with assays of the final results of the quartering, stated. *Id.*

3. *Moisture in other like ore.*—Upon a question of the amount of moisture contained in the ore, evidence of the amount found in other ore taken from the same ore body and worked under similar circumstances, is relevant. *Vietti* v. *Nesbitt*, 247

4. *Ore* means a compound of a metal and some other substance. *Armstrong* v. *Lake Champlain Co.*, 279

See CONFUSION; EXHAUSTED MINE, 1.

PARTIES.

1. *Proper co-defendants.*—Under a complaint alleging that a coal company, operating an adjoining mining property, had extended its operations into the plaintiff's premises, and that another company was working as the agent of the coal company, in an action for an injunction and an accounting, both companies were proper parties defendant. *United Co.* v. *Canon City Co.*, 639

2. *The defense that plaintiff is not the real party in interest* must be specially pleaded. *Wakeman* v. *Norton*, 698

See TRESPASS, 1.

PARTITION.

1. *Equitable title.*—Where one co-owner of property brings suit for partition, it is immaterial whether he has a legal or equitable title, and in either case he is entitled to the same relief. *Royston* v. *Miller*, 418

2. *As between a sale and a partition*, the courts will favor the latter. *Id.*

PARTNER.

1. *Miners and mill men not partners.*—The defendants, with others were owners of a mine which was being worked by the plaintiff under an agreement that the ore extracted should be worked in a mill belonging to defendants, and the proceeds divided as follows: The defendants to be paid $25 per ton for milling; the plaintiff was then to be paid the expense of extracting the ore; the balance was to be divided equally between him and the owners of the mine. *Held*, that these parties were simply tenants in common of the ore and its proceeds, and no partnership existed between them. *Vietti* v. *Nesbitt*, 247

PATENT.

1. *Presumption in aid of patent.*—The presumption of the law is in favor of the regularity of all proceedings in the land office anterior to the issuance of the patent. *Harkrader* v. *Carroll*, 474

2. *Diverse positions.*—A party who is seeking to obtain title under a patent granted to another cannot, at the same time, dispute its validity. *Id.*

3. *Patent carries surface and veins.*—A patent to a mining claim carries with it the right to the surface territory described therein together with all lodes or veins having their tops or apices within such boundaries, except, perhaps, cross lodes. *Argonaut Co.* v. *Turner*, 556

4. *Departure of vein immaterial, after patent.*—While in an adverse proceeding before a patent, the adverse claimant may, to defeat the entry, show that the vein relied on by his adversary departs from the side lines of the claim, he cannot for this reason invalidate a patent therefor after it has been issued. *Id.*

5. *Effect of disclaimer of area.*—Where a corporation, in applying for a patent for a mining claim, made a distinct disclaimer of a specific quantity of land, as being in conflict with a prior patent, it cannot claim relief in equity as to the conflict. *Golden R. Co.* v. *Buxton Co.*, 592

See ADVERSE CLAIM, 2, 11, 13; ALIENS, 4; LAND OFFICE; TOWN SITE, 1, 2.

PLACERS.

1. *Nominal associates.*—Under Rev. St. § 2331, which provides that no placer location "shall include more than twenty acres for each individual claimant," a claim located by three persons must be limited to said 20 acres when it appears that they are all in the employ, and acting in the interest, of a single company. *Gird* v. *California Co.*, 45

2. *To be excluded, lode must have value.*—A vein lying within the limits of a placer patent is not excluded therefrom as a "known vein or lode," under Rev. St. § 2333, unless at the date of the application the lode or vein was clearly ascertained, and of such extent and value as to justify exploitation. The fact that the lands were at one time previous to the application for the patent supposed to contain a lode or vein of value, or that they were afterwards discovered to be of value, does not impair the title under the patent. *Migeon* v. *Montana Co.*, 446

3. *A lode had been located, recorded* and its annual labor done for some years, but had been abandoned at date of placer application and had not at that time known workable value. *Held*, not such a known lode as to be excepted from the grant of the placer patent. *Id.*

4. *Presumption.*—Where a quartz lode claim is located within a placer claim, which lies in a town or city or in a town site, after an application for a patent to the placer claim has been made, there is a strong presumption in favor of the placer patent. *Casey* v. *Thieviege*, 624

See KNOWN LODE.

PLEADING.

1. *Effect of findings on overruled demurrers.*—Errors in overruling demurrers to pleadings, if there be a special finding or special verdict, may be cured by a proper statement or declaration of the law upon the facts found, but errors in sustaining demurrers cannot thus be cured. *Woodward* v. *Mitchell*, 158

2. *Finding beyond the pleadings.*—If a fact is embraced in the special finding which is not embraced in the pleadings, it cannot be considered in rendering judgment. *Id.*

See ABANDONMENT, 5; PARTIES; PRACTICE.

POSSESSION.

1. *Rights by possession in Alaska.*—By the special act creating Alaska land district, one then in possession of mining ground is protected the same as one who had made a complete location. *Bennett* v. *Harkrader*, 224

2. *Possession good against later intrusion.*—Plaintiff's actual

POSSESSION. *Continued.*

and peaceable enjoyment and possession of waters is sufficient title as against one who diverts them during such possession, and shows no better title. *Cardoza* v. *Calkins*, 689

See EJECTMENT, 2; TRESPASS, 2.

PRACTICE.

1. *Facts found by the trial court* upon conflicting evidence are conclusive upon appeal. *Vietti* v. *Nesbitt*, 247

2. *Assignment of error too general.*—An assignment of error stating that "there is error in said decree in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complainant," is too general, and cannot be aided by an attempt to make the same more particular in the brief. *Doe* v. *Waterloo Co.*, 265

3. *Inspecific briefs and assignments.*—When a specification of error as to the rejection of evidence states only the subject of the evidence, and does not give its substance, and the brief contains no reference to the page of the record showing the ruling, as required by rule 24 of the circuit court of appeals for the ninth circuit, the matter is not properly brought to the attention of the court. *Migeon* v. *Montana Co.*, 446

4. *Limit of review on second writ of error.*—Where a case has been brought before an appellate court, and there decided, a second writ of error brings up nothing for review but the proceedings subsequent to the mandate; and the appellate court is not bound to consider any of the questions which were before it on the first writ of error. *Republican Co.* v. *Tyler Co.*, 564

See INSTRUCTIONS; NEW TRIAL; NONSUIT; PARTIES; PLEADING; TRIAL; VERDICT.

PROMOTERS.

1. *Knowledge of promoters.*—As a general rule a corporation is not affected with notice or knowledge of facts merely because some of its promoters had knowledge of such facts, or because some of its stockholders had notice thereof. *Franklin Co.* v. *O'Brien*, 331

See CORPORATIONS.

PROSPECTING CONTRACT.

1. *Prospecting contract held within the statute of frauds.*—A partnership agreement to locate mining claims being within the statute of frauds (St. 1861, p. 11, § 55), one partner cannot claim an interest in a claim located by another under an oral agreement that they should be partners in all such locations, there being

PROSPECTING CONTRACT. *Continued.*

no sufficient proof that the locations were made with partnership capital. *Craw* v. *Wilson*, 244

PUBLIC DOMAIN—See ABANDONMENT, 10; MINING CLAIM, 1.

QUIET TITLE.

1. *Limited right to quiet title.*—One having a placer mining right, which can only be acquired on public land, can maintain suit to quiet title, if at all, only as to his limited interest. *Carter* v. *Thompson*, 134

2. *Abandoned lease a cloud on title.*—Lessors have the right to set aside by bill to quiet title an outstanding lease which has been in fact abandoned. *Woodward* v. *Mitchell*, 158

3. *The action to quiet title* under modern practice takes the place of what was known in chancery pleading as a bill of peace. *Id.*

4. *Void deed, cloud on title.*—A deed apparently valid, but in fact invalid as a conveyance of title, because dependent on a tax deed void on its face, constitutes a cloud on the legal title of the real owner, *Virginia Co.* v. *Kelly*, 395

5. *Equity has jurisdiction to remove a cloud* from the legal title of one who is in possession of the land, and is therefore prevented from bringing ejectment. *Id.*

RECORD.

1. *Record of location.*—The statute does not require any record of location, but when one is made it prescribes what the same shall contain, viz.: the name of the locator, the date of location, and such a description of the claim by proper references as will identify the claim. *Meydenbauer* v. *Stevens*, 578

2. *Purpose of record.*—The principal object of the record of the location is the identification of the claim; and if, considering everything it contains,—the name of the locator, the date of the location, and the description by reference to some natural object or permanent monument,—the claim can be identified, the record is sufficient. *Id.*

See LOCATION CERTIFICATE.

RELATION—See ALIENS, 2; RELOCATION, 1.

RELOCATION.

1. *An additional location certificate* of a mining claim must be based upon an original and relate back to the first location. *Hallack* v. *Traber*, 360

See END LINES, 3; RES ADJUDICATA, 2; TRUSTS, 2.

RENTS AND ROYALTIES.

1. *Equitable distribution of oil royalties regardless of surface divisions.*—Where three tracts of land, all subject to the same oil and gas lease, are devised respectively to the owner's three children, the royalties accruing under the lease are divisible among the three devisees, although all of the wells are sunk on one only of the three tracts. *Wettengel* v. *Gormley*, 93

2. *The lessor cannot recover rent* upon a void lease. *Marshall* v. *Mellon*, 548

See FORFEITURE; LEASE; OIL, 9, 11; TENANT FOR LIFE, 1-3.

RES ADJUDICATA.

1. *Extent of res adjudicata.*—When the jurisdiction of a controversy by a court is unquestioned, and the cause proceeds to final judgment, and no review is sought for, the judgment is conclusive upon the parties to the suit as to the matters decided, but not as to matters which might have been decided, but were not. *Last Chance Co.* v. *Tyler Co.*, 205

2. *Survey amended after adverse filed—Effect of ex parte adjudication.*—An adverse claim was filed and suit brought to support it. The adverse and the complaint showed a surface conflict. Defendant appeared and filed answer. But before trial defendant amended its survey so as to draw in its end lines and shorten its claim so as to exclude all the conflicting area. Defendant then withdrew the answer and allowed plaintiff to proceed *ex parte* to judgment. The court took testimony; found affirmatively that plaintiff had the prior location and gave judgment for the conflicting area. *Held*,

(1) That it appeared by the record that the court had in that case passed upon and determined the question of priority of location, and upon such determination had given judgment in favor of the plaintiff:

(2) That the defendant's withdrawal of its answer did not operate to take the complaint out of the case, or the allegations of fact contained in it, or to prevent a judicial determination of those facts:

(3) That the abandonment of his claim by the defendant did not take the jurisdiction for the settlement of the question out of the hands of the court, or restore it to the land department. *Id.*

3. *Title eliminated.*—After judgment in ejectment the only question in an action against the trespasser is the amount and measure of damages. *St. Clair* v. *Cash G. M. Co.*, 523

See ADVERSE CLAIM, 11.

RESCISSION.

1. *Testing by mill runs no acceptance.*—Complainant purchased

RESCISSION. *Continued.*

a silver mine from defendant, and afterwards discovered that the samples by which he had been induced to purchase had been "salted." He at once attempted to persuade defendant to take the property back, but he refused to do so. Complainant then erected a small mill in order to make more complete tests of the quality of the ore, and also sought to discover evidence to convict defendant of the "salting." He did not reach conviction upon this point until a year after the sale was consummated, and he at once filed a bill for rescission. *Held*, that there was not such a dealing with the property as amounted to a waiver of his right to rescind, nor was he guilty of laches. *Mudsill Co.* v. *Watrous*, 3

2. *Right to repudiate after breach.*—An instruction that if defendants interfered with, hindered, and prevented plaintiffs in the performance of the contract between them to such an extent as to render performance difficult, and greatly decrease plaintiff's profits, then such interference would justify plaintiffs in abandoning the contract and suing for damages, is not open to the objection that it permits a party to rescind a contract, and at the same time recover damages for its non-performance; for it merely asserts the right of one party to treat the contract as broken when the other party is guilty of a breach. *Anvil Co.* v. *Humble*, 99

3. *Buyer making examination for himself.*—A deed to property made in payment for stock in a silver mine will not be set aside for alleged false representations as to the value of the mine, where the grantor, before making the deed, examines the mine for himself, expresses himself as entirely satisfied, and, in fact, acts on his own judgment. *Crocker* v. *Manley*, 485

RES GESTAE.—See EVIDENCE, 7.

SALE.

See ABANDONMENT, 9; MINING CLAIM, 2; PARTITION, 2; VENDOR AND PURCHASER.

SEVERANCE.

1. *Separate owners of surface and minerals not co-tenants.*—Although a co-tenant cannot take advantage of any defect in the common title by purchasing an outstanding title or incumbrance, and asserting it against his companions in interest, yet the owner of the surface of the land and the owner of the minerals under it, where each holds a separate and distinct title, are neither joint tenants, nor tenants in common. They are not the owners of undivided interests in the same subject, but are the owners of distinct subjects of entirely different natures. The title to the freehold of the one, either in the surface or the minerals, cannot be

SEVERANCE. *Continued.*

acquired by adverse possession of the other, and the purchase of the outstanding title by the one does not enure to the benefit of the other. *Virginia Co.* v. *Kelly*, 395

2. *Facts of the case.*—C. conveyed to H. "all the coal, iron, stone, and other minerals * * * and all the timber * * * of every kind and description, in, upon, and under the surface" of certain land, reserving the right to use and take timber from the land for firewood. By another deed of the same date, H. conveyed to C. the said tract, reserving all the "coal, iron ore, stone, and other minerals, timber," etc., granted to him by C. *Held*, that the respective deeds did not make the parties or their grantees co-tenants, but invested them with distinct freeholds. *Id.*

STATUTE OF FRAUDS.

1. *A mining claim is real estate* and under the statute of frauds can be transferred only by operation of law or an instrument in writing. *Moore* v. *Hamerstag*, 256

2. *Where there is no fiduciary relation* and no previous contract a parol promise by the person whose name is used to convey to the actual locator is within the statute and non-enforceable. *Id.*

See PROSPECTING CONTRACT, 1.

STATUTE OF LIMITATIONS.

1. *Secret trespass discovered after limitation period.*—Where a landowner by means of openings on his land and subterranean passageways, mines and removes the coal from the adjoining land, without the knowledge or means of knowledge by the owner of the latter, limitation of his right of action for compensation does not begin to run until he discovers the trespass, or until discovery is reasonably possible. *Lewey* v. *H. C. Frick Co.*, 179

See ADVERSE POSSESSION, 1; LACHES.

TENANT FOR LIFE.

1. *Life tenant takes all royalties.*—An owner in fee simple makes an oil and gas lease for a term of five years, and as much longer as the premises are operated for oil and gas, or the rent for failure to commence operating is paid for, among other things, one-eighth part of all oil produced and saved, to be delivered in the pipe lines to the credit of the lessor. The lessor then sells and conveys one undivided moiety of the one-sixteenth part of all the oil produced and saved. Afterwards, but before any oil is bored for or produced, the lessor sells, grants, and conveys the land in fee simple to his six children, to each one a part, by metes and bounds, in consideration of natural love and affection, by

TENANT FOR LIFE. *Continued.*

deed of general warranty, "except that the party of the second part takes the same subject to any lease for oil or gas made by the party of the first part or any sale of royalty for oil or gas made by him;" and, by the same deed, he retains full control of said land in all respects, and for all purposes, during his lifetime. Soon thereafter oil wells are bored, and oil produced, saved, and put in the pipe lines in large quantities. *Held*, the one-eighth royalty goes of right to the tenant for life and his grantees, during the continuance of the estate for life, and not to the owners in fee of the estate expectant thereon. *Koen* v. *Bartlett*, 289

2. *Life tenant has right to full enjoyment.*—The tenant of an estate for life, unless restrained by covenant or agreement, has a right to the full enjoyment and use of the land and all its profits during his estate therein, including mines of oil or gas open when his life estate begins, or lawfully opened and worked during the existence of such estate. *Id.*

3. *Rights of life tenants.*—If the lessors in an oil lease are life tenants and remainder-men the life tenants are entitled to the interest on the royalties during life, and at their death, the corpus of the fund made up of the aggregate royalties goes to the remainder-men. *Blakley* v. *Marshall*, 350

4. *Where no oil or gas* operations have been commenced on land before an estate for life has accrued, the tenant for life has no right to operate for oil or gas himself and cannot give such a right to any person by lease. *Marshall* v. *Mellon*, 548

5. *New oil well—same rule as unopened mine.*—A life tenant of oil and gas lands which had never been operated for oil or gas executed a lease for oil and gas purposes exclusively. The lessees did not operate the land, or perform any of the covenants of the lease, and refused to pay the rent stipulated. *Held*, that the lessor could not enforce the lease. *Id.*

TENANTS IN COMMON.

1. *Assumpsit against a co-tenant* does not lie except on an express promise and on accounting a co-tenant is liable only for any excess received. The law of accounting between co-tenants in Pennsylvania reviewed. *Enterprise Co.* v. *National Co.*, 312

2. *Facts of the case.*—Several co-tenants of an oil lease assigned the lease to an operator who was to deliver to them a part of the product. One of the joint owners did not join in the assignment, and notified the assignee not to deliver any oil to his co-tenants. *Held*, (1) that the party not joining in the assignment was not entitled to his share of the oil without proving that his co-tenants had received more than their share; (2) that if he chose to affirm

TENANTS IN COMMON. *Continued.*

it, he must take his share with the others upon a distribution of the royalty after deducting all proper charges and expenses. *Id.*

3. *Purchase by co-tenant of overlapping location—Purchase of outstanding title.*—A purchase by a tenant in common of an outstanding title to the premises ordinarily inures to the common benefit of all the co-tenants, and this rule applies to the purchase by a tenant in common in a mining claim of an interest in a senior conflicting location. *Franklin Co.* v. *O'Brien*, 331

See ANNUAL LABOR, 8; SEVERANCE, 1.

TENDER.

1. *A tender* after rescission will not revive a surrendered lease. *Hooks* v. *Forst*, 139

TIME—See FORFEITURE, 1-5; OIL, 7.

TOWN SITE.

1. *Offer of public lands for sale at auction* is not a condition precedent to their being patented for a town site. *Carter* v. *Thompson*, 134

2. *Attack on town site patent.*—A patent for a town site cannot be attacked by one whose rights, if any, in the land, attached after issue of the patent, on the ground that the land was theretofore known to be mineral land, but it can be assailed only in a direct proceeding by the United States. *Id.*

TRESPASS.

1. *The lessor and lessee of a coal mine may join* as plaintiffs in an action for injunction and accounting against a trespasser on the property, who has wrongfully taken and is taking coal therefrom. *United Coal Co.* v. *Cañon City Co.*, 639

2. *Recovery on possession.*—Plaintiff in trespass in possession under paper title may recover without proof of his chain of title against a party defending under a separate title to wit: a lode dipping underneath the plaintiff's location. *Wakeman* v. *Norton*, 698

See ACCOUNT; BOUNDARIES, 1; CONFUSION; INJUNCTION; MEASURE OF DAMAGES; RES ADJUDICATA, 3; STATUTE OF LIMITATIONS, 1.

TRIAL.

1. *Latitude to counsel—Expectation of life.*—Remarks of counsel on amount of damages based on plaintiff's expectation of life quoted, and held allowable. *Gowen* v. *Bush*, 435

See JURY, 1; VERDICT.

TRUSTS.

1. *A trustee is not permitted to reap a profit* or gain an advantage directly or indirectly, from the trust estate or from his relation to it. *Hallack* v. *Traber*, 360

2. *Trustee relocating in his own name.*—One to whom interests in a mining claim had been conveyed for the purpose of obtaining a patent for the benefit of all the owners filed an amended or additional location certificate taking in additional territory and afterwards obtained a patent to the claim as described in the additional or amended certificate. *Held*, that the title to the territory thus acquired inured to the benefit of all the *cestuis que trust*. *Id.*

See LOCATION, 3; STATUTE OF FRAUDS, 2; TENANTS IN COMMON, 3.

TUNNELS.

1. *Construction of the rights of tunnel sites.*—The clear import of the language of Rev. St. Sec. 2323 is to give to a tunnel owner, discovering a vein in the tunnel, a right to appropriate fifteen hundred feet in length on that vein; which right arises upon the discovery of the vein in the tunnel; dates by relation back to the time of the location of the tunnel site; may be exercised by locating the claim the full length of fifteen hundred feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire. *Enterprise Co.* v. *Rico Aspen Co.*, 661

2. *And is not destroyed or impaired by the failure of the owner of the tunnel to adverse* a previous application for a surface patent before the discovery of the vein. *Id.*

3. *The Colorado territorial statute of 1861*, limiting a tunnel owner to 250 feet each way on a vein discovered in the tunnel, if not in terms subsequently repealed, was superseded by the legislation of congress. *Id.*

4. *No location of veins discovered needed.*—The discovery of a vein in a tunnel, worked according to Rev. St. Sec. 2323, gives a right to the possession of the vein to the same extent as if discovered from the surface, and a location on the surface is not essential to a continuance of that right. *Campbell* v. *Ellet*, 669

5. *A record of such claim* in connection with the notice at the mouth of tunnel under the terms of the statute gives title to the vein discovered without staking on surface. *Id.*

See DUMP, 1.

VENDOR AND PURCHASER.

1. *Right to work implies right to proceeds.*—The term "working a mine," as used among miners, implies, not merely the right to explore and develop, but the right to extract and appropriate ores as the owner himself might do. *Bailey* v. *Bond*, 466

VENDOR AND PURCHASER. *Continued.*

2. *Instance—Power to work limited—Commission not earned.*—Defendant agreed to pay to plaintiff a certain sum when, he, plaintiff, should procure from the owners a bond on a certain mine on certain terms, among which should be the right to enter into possession and work during the life of the bond. Plaintiff procured a bond limiting the right to sell ore to a limited amount, all mining to be done under owners' directions and proceeds kept in bank. *Held*, that plaintiff had procured no such bond as defendant was bound to accept. *Id.*

See FRAUD; RESCISSION.

VERDICT.

1. *A general verdict is sufficient* in a suit supporting an adverse claim. *Bennett* v. *Harkrader*, 224

2. *A general verdict* is sufficient in an adverse claim suit and its availability for use in the land office is not a matter of concern to the court. *Altoona Co.* v. *Integral Co.*, 411

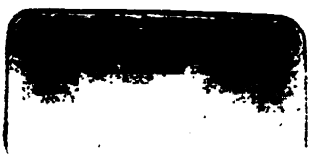
3. *Verdict in suit supporting adverse claim.*—In determining the sufficiency of the verdict it is to be considered in its entirety. The verdict set forth in the opinion contains all that is requisite. *Taylor* v. *Parenteau*, 534

4. *Counsel assisting in preparing form of verdict.*—A party whose counsel assisted in the preparation of a form of a verdict and who failed to point out an alleged defect before it was given to the jury, or to ask for its correction when returned into court, will be held to have waived objection thereto on account of form. *Id.*

5. *Description in verdict.*—If judgment be for the plaintiff in an action of ejectment, the property should be described in the verdict or findings and judgment with such certainty as is reasonably available. *Argonaut Co.* v. *Turner*, 556

See EQUITY, 2.

WATER.

See DITCH; POSSESSION, 2.

Stanford Law Library
3 6105 06 033 395 7